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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1952.

Term No. 6 8/60 24 Agenda No. 23

Roscoe Cheatham, Appellant)
) Appeal from
VS.) Circuit Court
) Bond County.
Mildred Cheatham, Appellee)

269 I.A. 667

Fulton, J:

The Appellant, Roscoe Cheatham, filed a bill for divorce in the Circuit Court of Bond County against the Appellee, Mildred Cheatham, on the grounds of adultery. The appellee answered denying the charges of the bill, and also filed a cross-bill for divorce charging her husband with adultery and also with extreme and repeated cruelty. The Appellant answered the cross-bill denying all its allegations as to the offenses charged. The cause was heard by the chancellor. At the conclusion of all the testimony the Court entered a decree finding both parties guilty of adultery and dismissing both the Original bill and the Cross bill for want of equity. The decree also awarded the custody of a child born to said marriage to its grandmother, Mrs. Lewis Cheatham, except that the Appellee was given its custody for one week out of every four. The Decree further ordered certain household furniture to be turned over to Appellee. Appellant seeks to reverse said Decree in every particular except the portion which finds Appellee guilty of adultery and asks that a final Decree for divorce be awarded to Appellant.

Where a decree is entered dismissing both the Original Bill and Cross bill for want of equity, the Court is without jurisdiction to adjudicate concerning property in the possession of the

Appellant or to make any order concerning the custody of the child. Silkwood vs. Silkwood, 262 App. 516; Thomas vs. Thomas, 250 Ill. 554.

The parties in this case were married June 7, 1928, and lived together as man and wife until December 30, 1931. One child was born to them named Kenneth LeWayne Cheatham about three years of age. The testimony of Appellant and his witnesses fully sustain the charge of adultery against the Appellee. One witness Joe Zori testifies positively to having had sexual intercourse with her on at least seven or eight occasions while she was living with her husband and there is abundant testimony by other witnesses of her being out with other men under very suspicious circumstances.

The testimony offered in support of the adultery charge in the Cross bill is not of the definite or positive character that would support so serious a charge.

The Appellee testified that she had $650.00 at the time of the marriage and that $600.00 of that amount was turned over to her husband, and this is not denied by Appellant.

For the reasons above assigned the decree of the Circuit Court will be reversed and set aside with directions to enter a decree of divorce for Appellant on the grounds of adultery, to award the custody of the child Kenneth LeWayne Cheatham to Appellant, the Appellee, however, to have the custody of said child for one week out of every four, until the child arrives at school age and to order the furniture to be delivered to the Appellee, Mildred Cheatham, to be her property.

Reversed with Directions as to entry of New Decree.

Not to be reported in full.

abst. — per letter 2-3-33

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.
OCTOBER TERM, A. D. 1932

TERM NO. 9. AGENDA NO. 29.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	WRIT OF ERROR TO
vs.	CIRCUIT COURT OF
CHARLES E. PIXLEY AND HERBERT C. LIBKIE, Plaintiffs in Error.	WHITE COUNTY.

FULTON, J.:

Charles E. Pixley and Herbert C. Libkie were indicted in the Circuit Court of Edwards County for accepting deposits in the West Salem State Bank of that County, when they knew the same to be insolvent. Pixley was the President and Libkie the Cashier of said bank. Plaintiffs in Error obtained a change of venue from said Court to the Circuit Court of White County. Upon a trial before a jury Plaintiffs in Error were both found guilty and a fine of $400.00 imposed upon each, and they were each sentenced to serve an indeterminate sentence of not less than one nor more than three years in the Southern Illinois Penitentiary at Menard. The case is brought to this Court on a writ of error.

Plaintiffs in Error urge that the Court erred in overruling the motion to quash the indictment. The various counts of the indictment reasonably construed substantially charge that Plaintiffs in Error on August 8, 1928, were President and Cashier respectively of the West Salem State Bank, a banking Company, incorporated under the laws of the State of Illinois, engaged in the banking business at West Salem, Illinois:

that Plaintiffs in Error on said date knowingly and fraudulently received for deposit for said bank from one H. F. Fildes, a draft for $200.00, the said H. F. Fildes not being indebted to said bank: That the said bank on August 8, 1928, was insolvent and that Plaintiffs in Error knew it to be insolvent, and because of such insolvency the said deposit was lost to the said Fildes, whereby Plaintiffs in error are deemed to be guilty of embezzlement. Counsel contends that the indictment does not accurately and clearly set forth all the ingredients of which the offense is composed but in our judgment the language of the indictment is sufficient under the Statute and the Circuit Court properly overruled the motion ot quash.

The testimony shows that on August 8, 1928, one H. F. Fildes placed with said bank, through the Cashier Libkie, a sight draft signed by himself for $200.00, drawn against his account in the Calhoun County State Bank of Manson, Iowa, which Fildes states he left with the bank for collection. He did not have his pass book along and was given a duplicate deposit slip with a conditional statement about the bank acting only as depositors agent in making the collection. The draft was paid by the Calhoun bank on August 13, 1928, but Fildes was given credit on his individual ledger account as of August 9, 1928. The draft was returned to Fildes when his book was balanced and the amount thereof deducted from his account in the Calhoun bank. The evidence further discloses that the bank had been examined regularly by the State Auditor's Office and that on May 1st, 1927, Pixley and Libkie had been notified by the examiner that their indebtedness to the bank was much larger than it should be and to reduce or get their loans out of the bank. Various meetings of the Board of Directors had been held

and the affairs of the bank seriously discussed from December 1927, down to the closing of the bank at the close of business on August 10, 1928. During the last two days the bank was open, being August 9th and 10th, $11,000.00 of deposits were withdrawn. On August 11, 1928 the Auditor's Office took charge. The first receiver committed suicide a few months after his appointment and the second receiver died from illness. A Third Receiver, David Osborn, was afterwards appointed. Osborn testified that he received some of the notes offered in evidence from the Auditor's Office and that he found other notes in the bank vault: The record does not disclose any evidence that any of these notes were carried as assets upon the books of the bank. People's Exhibit 6 was identified as the note register but was never offered or received in evidence. Two photostatic copies of audits or reports of the condition of the bank made to the State Auditor, one on May 1, 1928, and one on August 8, 1928, were identified as People's Exhibits 101 and 102, but objections were sustained to both exhibits. People's Exhibit No. 7 was the daily balance sheet of the bank under date of August 8, 1928, and shows the bank had a surplus of $4550.00 and the capital stock was $25,000.00, thus making the net assets $29,550.00. The People undertook to show that many of the makers of the notes were insolvent. Under the holding of the Supreme Court in the case of The People vs. Harry Clark, et al, 329 Ill. 104, this proof was essential and the opinions of witnesses concerning the condition of the bank and the values of notes and securities, without adducing the facts which support the opinions, should not be admitted in evidence. The testimony presented by the People in this case tested by this rule was insufficient to show insolvency of the makers of the notes with

two exceptions, Charles Hines, and the Plaintiff in Error Pixley. The situation concerning these notes was argued by counsel for Plaintiffs in Error and the People did not attempt to show that the facts were otherwise.

The People further contend that the bank was insolvent and that Plaintiffs in Error knew it was insolvent because they were both hopelessly insolvent and knew they were insolvent, and that their own notes were sufficient to extablish the insolvency of the bank. No evidence was offered by the State to show that Plaintiff in Error Libkie was insolvent but on the contrary they offered in evidence a financial statemtn made by Libkie under date of January 1, 1928, showing that his net worth at that time was $18,500.00. It also appears from the record that at the time the bank closed Libkie was indebted to the bank in the sum of $5,107.97. Taking all the notes made by Plaintiff in Error Pixley and the notes endorsed by him individually and as executor and trustee that were property admitted in evidence they amount to $16,482.96, adding to that the Libkie debt of $5,106.97, makes a total indebtedness of Pixley and Libkie the sum of $21,589.93. The evidence however does not show that Libkie was insolvent. Deducting the Pixley notes from the amount of the capital and surplus, $29,550.00, leaves a balance of $13,067.04. It is therefor apparent that the alleged insolvency of the Plaintiffs in Error did not render the bank insolvent.

The Fildes draft was deposited in the bank on August 8, 1928. That draft was for $200.00 and was paid by the Iowa bank on August 13, 1928, three days after the bank closed. The draft was received for collection and was not accepted as a deposit of cash. There is no evidence to show what was done with the

$200.00 after it was paid by the Iowa bank. If it was paid to the Receiver the money was lost to Mr. Fildes. We believe it would be a preferred claim which the Court would allow as a preference.

It was incumbent upon the prosecution to show that the West Salem State Bank was insolvent on August 8, 1932, by competent evidence and that the Plaintiffs in Error had knowledge of that fact. The term insolvent as used by the Statute does not mean insolvent in the limited sense of inability to pay indebtedness in the ordinary course of business, but the term means insolvent in the broad general sense of a deficit of one's assets in realizable cash available within a reasonable time, treated as an ordinarily prudent person would generally conduct his business under the same or similar circumstances to pay his liabilities. People v. Clark, Supra. People v. Gould, 345 Ill. 288.

The solvency of the bank is to be determined by a consideration of the evidence in regard to the value of its assets and the burden was upon the People to show insolvency beyond a reasonable doubt. This they have not done by competent evidence.

We do not deem it necessary for the disposal of this writ of error to consider the other contentions made by Plaintiffs in Error for the reversal of the judgment.

For the reasons assigned, the judgment is reversed and the cause remanded to the Circuit Court.

REVERSED AND REMANDED.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1952.

ITEM NO. 22. AGENDA NO. 1.

HUGH M. STOKES, Appellee,	APPEAL FROM
vs.	CIRCUIT COURT
M. E. FULKERSON, Appellant.	WHITE COUNTY.

269 I.A. 667

FULTON, J:

A judgment by confession for $528.40 was entered in the Circuit Court of White County in favor of Appellee, Hugh M. Stokes, against M. E. Fulkerson, Appellant. On motion of Appellant the judgment was opened up and he was given leave to plead. He filed the general issue, the ten year statute of limitation, and a special plea setting up that the note in question had been materially altered by changing the rate of interest thereon from seven per cent to six per cent, by an endorsement on the back of the Note. Replication to the second plea was filed and set up that interest had been paid on the note every year by a co-maker, W. H. Fulkerson, brother of Appellant, but with the knowledge, acquiescence and approval of Appellant. Replication was also filed to the third plea alleging that the alteration was made with the knowledge and consent of Appellant. A trial by jury was had and a verdict rendered in favor of Appellee for $500.00. Appellant moved for a directed verdict at the close of all the evidence and for a new trial, both of which were overruled. Judgment was entered upon the verdict and Appellant has appealed.

Appellant contends that the court erred in permitting Appellee to testify that in a conversation with Appellant the latter said, "I will see Will (his brother who was a co-maker) and we will make an effort to get it. When we signed that note we aimed for

it to be a good note". Appellant objected to the testimony and moved to have it stricken because it was a promise to pay and must be in writing. No contention was made by Appellee at the trial that this amounted to a new promise but was introduced for the purpose of showing knowledge and acquiescence on the part of the Appellant. For the latter purpose the testimony was competent. Appellant further insists that the Court erred in denying the motion to direct upon two grounds. First, because the note was more than ten years past due, no payments having been made by Appellant, and payments by the Co-maker were made without any authorization, or ratification from Appellant. Appellee testified that W. H. Fulkerson paid the interest regularly each year up to and including 1930; that Appellant often enquired and was frequently informed about the payment of interest and he indicated his satisfaction that the interest was kept paid up. Appellee is corroborated in this respect by his sister Cordelia Stokes and his nephew Martin Stokes. There is further testimony by Appellee and his sister that during the ten year period Appellee told Appellant he needed the money and wanted the note paid, to which the Appellant replied that when he signed the note he signed it to make it a good note and would see that it was paid. Other similar conversations are testified to by Appellee and his sister. This testimony is denied by Appellant, but it was evidence of knowledge, acquiescence and ratification by the Appellant, which if true, warranted the Court in denying the motion to direct and submitting the issue to a jury. The case of Kallenbach vs. Dickinson, 100 Ill. 427, cited by Counsel for Appellant, does not reveal that payments were made with knowledge of the Co-maker. That case relied on the principal that payment by one of the joint makers effected a tolling of the statute of limitations as against the other joint maker regardless of any evidence of knowledge or ratification. The other ground urged

in support of the motion to direct was the alteration of the instrument without the consent of Appellant. Appellee, his sister and nephew all testify positively to a conversation with Appellant in 1918 in which he was notified of the change and expressly agreed and consented to it. True this conversation was denied by Appellant but it was clearly sufficient if true and a proper issue of fact for the jury to determine.

The complaint about Appellee's second instruction is without merit and is covered by the finding of this court on the motion to direct.

Appellant further contends that the judgment cannot stand because the Court entered an independent judgment on the verdict instead of ordering that the original judgment continue in full force and effect to the extent of $500.00, the amount of the Verdict. An error in the form of the judgment rendered will not justify a remandment for a new trial, but one merely for the purposes of correction. Northeastern Coal Co. vs. Tyrrell, 135 App. 472.

Finding no substantial error in the record the cause will be remanded to the Circuit Court of White County with instructions to amend the judgment of March 17, 1931, by substituting for the words "It is therefore entered of record that the plaintiff, Hugh M. Stokes, have and recover of and from the Defendant, M. E. Fulkerson, the said sum of five hundred twenty-eight Dollars and forty cents, damages as aforesaid, together with all costs of this proceeding, and that immediate execution issue" the following words; "Therefore, it is considered by the Court that the judgment entered herein on March 17, 1931, in favor of plaintiff and against defendant for $528.40, and costs, stand in full force and

effect to the extent of $500.00, the amount of the verdict, and costs, as of the time of its rendition and that the plaintiff have execution thereon".

REMANDED WITH DIRECTIONS AS TO AMENDMENT OF JUDGMENT.

Note to be reported in full.

A 29

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT.

OCTOBER TERM, A. D. 1952.

TERM NO. 34. AGENDA NO. 5.

JAMES J. FOGERTY, Appellee,	APPEAL FROM
vs.	CITY COURT OF
EDWARD C. MAUER, Appellant.	EAST ST. LOUIS.

269 I.A. 667

FULTON, J.:

This is an appeal by Appellant from a judgment against him for $7500.00 entered upon the verdict of a jury in an action seeking damages for personal injuries sustained by Appellee and resulting from the wrecking of an automobile in which Appellee was riding with the Appellant while the car was being driven on a public highway North of Jacksonville near the Village of Bluff Springs.

The declaration consisted of one Count alleging that on August 31, 1930, while Appellee was riding in the Automobile of Appellant as an invited guest and was in the exercise of due care and caution for his own safety, the Appellant carelessly, negligently and improperly operated his said automobile so that by reason thereof the said automobile suddenly ran off the highway and into a ravine, thereby seriously and permanently injuring the Appellee. Appellant filed the general issue. This is the second time a jury has awarded a verdict in this case on the same set of facts. A former judgment was reversed by this Court because of error in the trial Court for refusing to admit certain testimony offered by the Appellant.

TERM NO. 34.

The principal questions in the case are whether or not the verdict of the jury was contrary to the manifest weight of the evidence and whether the Appellee was guilty of such contributory negligence as would bar a recovery.

The Appellees case rests almost entirely on his own testimony. He testified that he and Appellant had been friends for a great many years; that on the occasion in question Mauer invited him to take a trip with Appellant and wife to Galesburg; that they left his home in East St. Louis on Saturday evening and drove to Mauer's home in Alton, stayed there over night and the three of them left the Mauer home about nine o'clock Sunday morning; that he did not take any intoxicating liquor with him but that he and Mauer had a couple of highballs on Saturday evening; that he had nothing to drink Sunday morning and did not see Mauer drink anything that morning; that he did not put any intoxicating liquor in the car Sunday morning and did not see any placed therein.

He further testified that on Sunday morning they started north in the Mauer automobile, Mr. and Mrs. Mauer riding in the front seat and Appellee in the rear; that the first stop was made just north of Jacksonville, where the party had some lunch; that Mauer and his wife began quarreling and when they started on Appellee rode in front with Appellant and Mrs. Mauer rode in the rear seat; that he had never driven an automobile and knew nothing about its operation and had no control over the operation of the car on this occasion; that he did not drink any intoxicating liquor during the lunch hour and did not see any one else drink any. He testified, further, that when they started on Mauer started driving very fast and the last eighteen miles before the accident drove from sixty to eighty miles per hour; that Appellee cautioned the Appellant

to slow down several times or to stop the car and let him out; that about the time of the accident Mauer was driving seventy or eighty miles per hour and all of a sudden the car shot off the highway through the guard fence into a ravine; that he received an awful blow on the head and became unconscious; that Mauer seemed angry just prior to the accident but was not intoxicated; that the car was not stopped after lunch until the accident. Both Appellee and Appellant were seriously injured.

As opposed to Appellees story the testimony of Mauer showed that both men were well under the influence of liquor at the time of the accident, had placed a large quantity of liquor in the car upon leaving Alton that morning, had been drinking together all morning and in fact had been drinking a good deal together for several days; that Fogerty never said anything to Appellant about his driving or how fast the car was going.

State highway patrolman Campbell, Sheriff Jokisch of Cass County, Robert A. King, a mechanic from Beardstown and J. K. Campbell, a carpenter from Winchester all arrived shortly after the accident and testified positively that they smelled liquor on the breath of both Appellee and the Appellant and in their opinion both men were drunk. They further testified to finding broken bottles and evidence of liquor in and around the car.

Both King and J. K. Campbell testified positively that they saw Mauer's car stopped along the highway five or six miles from the scene of the accident. The witness King observed the two men sitting in the front seat with heads down as he drove past them going north on the highway; that later the Mauer car came up behind him on the highway and was swinging from one side of the road to the other; that he put his car in second gear and pulled off

or the right side of the road to let the Mauer car pass. Campbell testified that he saw one of the men out on the right hand side of the car either on the ground or on the running board with one foot on the ground as he was approaching the Appellants car from the rear, and as it was stopped along the highway.

An analysis of the evidence compels us to believe that the Appellee is contradicted in two material features of the testimony. First, as to whether or not the two men had been drinking and were more or less under the influence of liquor and second that a stop was made on the highway by the Mauer car a few miles from the scene of the accident. The testimony of the two officers and the other two witnesses is entirely believable and corroborates Appellants theory of what happened. It would be hard to disbelieve the story of the two impartial witnesses as to the stopping of the Mauer car on the highway a few miles from the accident. If that be true and Mauer had been driving recklessly it was Fogertys duty in the exercise of ordinary care for his own safety to refuse to continue the journey.

While a Court of Review is reluctant to set aside the verdict of a jury, yet, where, after giving due consideration to the contradictory stories of the witnesses, it is of the opinion that the verdict is clearly against the weight of the evidence; it is its duty to set it aside and reverse the judgment. A performance of this duty is absolutely essential for the preservation of the rights of citizens and property owners.

C. &. E. R. R. Co. vs. Mosch, 163 Ill. 305.

In view of the uncertain testimony of the Appellee in some respects and the very definite, positive statements of the witnesses for Appellant on the material features of the testimony

above discussed we find that the verdict is clearly against the weight of the evidence and that the judgment must be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

The Clerk will insert in the judgment the following:

> "The Court finds that Appellee was guilty of contributory negligence to such a degree as to bar recovery in this case."

Not to be reported in full.

STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

OCTOBER TERM, A. D. 1952.

TERM NO. 18. AGENDA NO. 24.

ASSOCIATES INVESTMENT COMPANY OF ILLINOIS, A CORPORATION,
APPELLANT.

VS.

A. T. PETERSON, ET AL.,
APPELLEES.

APPEAL FROM CIRCUIT COURT OF ST. CLAIR COUNTY.

EDWARDS, J.

This is an action of replevin instituted by appellant against appellees in the Circuit Court of St. Clair County. The cause was heard before the Court and a jury. At the close of the appellant's evidence, the Court directed a verdict in favor of appellees, upon which judgment was entered, in the latter's favor, and appellant has appealed, assigning the action of the Court in directing a verdict, as error.

Appellant has fully met all the legal requirements in the prosecution of such appeal. Appellees have filed no brief, as required by rule of this court; therefore the judgment is reversed and the cause remanded. Eichelberger v. Robinson, 253 Ill. App., 579.

REVERSED AND REMANDED.

Not to be reported in full.

STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

OCTOBER TERM, A. D. 1932.

TERM NO. 26. AGENDA NO. 3.

ZOLA LAWRENCE, ADMINISTRATRIX OF THE ESTATE OF CARLSON LAWRENCE, DECEASED, APPELLEE.	APPEAL FROM
VS.	CITY COURT
DE L. REID, APPELLANT.	OF ALTON.

EDWARDS, J.

This action was instituted by appellee, as administratrix of the estate of Carlson Lawrence, deceased, against appellant, to recover damages in behalf of the next of kin of the decedent, who was struck by an automobile of appellant and sustained injuries from which he the same day died. The case was tried on January 23, 1931, and verdict returned, which was later set aside. It does not appear from the abstract in whose favor such verdict was rendered. In December, 1931, the case was again tried, the jury making a special finding that appellant was guilty of willful and wanton conduct, and also returning a general verdict for appellee in the sum of $6,000.00, which the court ordered remitted to $5,000.00, and entered judgment for the latter amount.

The case, as last tried, was upon a declaration consisting of twocounts, the first charging general negligence, the second that appellant, by willful and wanton conduct, occasioned the injuries which resulted in the death of Carlson Lawrence; to which was pleaded the general issue.

TERM NO. 26.

It appears that on Sunday, June 1, 1930, Doris Lawrence, husband of appellee, with his family, started from their home in Carlinville by automobile, over State Route 112, for St. Louis. They were traveling southerly, in two cars, one driven by Lawrence, the other by his step-son, Lewis Henderson. When a few miles from Bunker Hill, they parked their cars on the dirt shoulder of the road, about four feet off the west edge of the concrete slab, in front of a schoolhouse, which was on the east side of the road, for the purpose of getting water at the well in the school yard. Henderson's car was located about six or eight feet directly in the rear of the one owned by Lawrence. All of the party except appellee, her son Carlson, the decedent, who was then less than four years of age, and the baby aged two years, went over to the well. Soon thereafter, Carlson asked for a drink, whereupon appellee alighted from the car with the two children, and taking each by the hand, started for the cement slab. When at its edge, she stopped, looked south, saw two cars coming, waited for them to pass; then seeing no more, she let go of Carlson's hand, stooped to pick up the baby, and told Carlson to run across the road, which he started to do, when the car of appellant, coming northerly, struck him, causing injuries of which he in a few hours died.

The foregoing facts are not disputed. The controverted testimony is substantially as follows:

Doris Lawrence, father of deceased, a next of kin and beneficiary, testified, without objection to his competency, that he was returning from the well with a glass of water; that he had not

seen nor heard anything unusual until he was about thirty or thirty-five feet from the east edge of the pavement, when he saw Carlson coming toward him; that the boy was stepping off the concrete, and that appellant's car was about fifteen feet from him; that he had not heard the approaching car; that it struck Carlson when he was off the cement; after which it swerved to the left, crossed the road, ran about one hundred and thirty feet, and turned over in the ditch; that the boy was knocked about fifty feet; was picked up by the witness, who stated that he was not bleeding, nor were there any visible marks or bruises upon him. He further expressed the opinion that appellant's car was going about fifty miles an hour at the time of the accident; though on cross examination he stated, "I do not say I think Reid was driving the car at 50 miles an hour".

Lewis Henderson, son of appellee, testified that he was at the well when the accident occurred; that he saw appellant's auto, though he would not say that he saw the boy struck; that he heard the car coming; that it was roaring; saw it coming for some distance, and was of opinion that it was going around fifty miles an hour. This witness admitted, and it was otherwise proven, that the day after the accident, at the Coroner's Inquest, he testified relative to the occurrence: "I was pumping, and did not see the accident or the car that struck Carlson, until it hit the concrete abutment and turned over; did not see the car before the accident, and did not know how fast it was going."

Appellee's account of the occurrence was that when she and

the children alighted from the car, they walked, - she holding them by the hand, to the west edge of the concrete slab, between the two autos; that she looked south, waited for two cars to pass, reached down to pick up the baby, released Carlson's hand, told him to run across to his father; looked up and saw the Reid car striking the boy, on the east side of the road, about opposite from her; did not see the car until it struck him; that he was stepping off the concrete, on to the dirt shoulder, when the car hit him, and that she thought it was going about fifty miles an hour. Mrs. Neoma Reid swore that she talked with appellee the day of Carlson's funeral, and was told by her that she did not see the car strike the boy. This appellee denied.

On the part of appellant, LaFayette Reid, his son, gave testimony that his family were traveling north on the highway, he driving the car of his father, who was present at the time; that they were going to Carlinville, the day being Sunday, and the hour about noon; that he was driving in the neighborhood of thirty-five miles an hour, or perhaps a little more; that when about twenty-five or thirty feet from where the two autos were parked, the little boy ran out in front of him; that he swerved a little to the right, thinking he could pass in safety; then, seeing he could not, turned sharply to the left, ran off the road, hit a culvert and overturned; that when he struck the child, the latter was on the pavement, about six or eight feet from the east edge; that it came out from between the two cars; that he did not see appellee at the time that the child was running across the road;

Joseph Stanka stated that he and his wife were riding northerly on Route 112; that they were traveling about fifteen miles an hour; that appellant passed him shortly before the accident. In the opinion of the witness, appellant's car was being driven about twenty-five miles an hour. Ruth Stanka, his wife, testified substantially as her husband, except that she thought appellant's car was going about twenty miles an hour when it passed them, and she did not know of its speed when the accident occurred.

Henry Heine, a farmer, was a quarter of a mile from the scene, standing in his yard, looking at the cars; saw the child step from behind the car on to the cement slab, and in going across, went in front of the car; saw the child "roaming" away from the slab on the east side; saw the Reid car coming; dont know how far it went after it hit the child; it did not go very far.

In this state of the record, with testimony conflicting upon material questions, it is important that the instructions upon the salient features should be clear and explicit.

In Appellee's sixth instruction, the Court charged the jury that while she must prove her case by the greater weight of the evidence, yet if her evidence preponderated over that of appellant, even but slightly, it would suffice to warrant a verdict in her favor. In Wolczek v. Public Service Co., 342 Ill., 482, at page 495, which is the last expression of the Supreme Court on the question, so far as we are advised, the court, discussing such an instruction, said: "This instruction has been repeatedly

condemned as argumentative, and as tending to emphasize the weight of plaintiff's evidence. Reivitz v. Chicago Rapid Transit Co., 327 Ill., 207. Teter v. Spooner, 305 Ill., 198. While in those cases the judgment was not reversed because of such erroneous instruction, the plaintiff's evidence in those cases clearly out-weighed the evidence of the defense. There is not such a disparity between plaintiff's and defendant's evidence in this case, as in those cases, and the instruction was error."

In the instant case, the proof was close and conflicting, and under the authority of the case cited, the instruction was erroneous and should have been refused.

Given instruction number ten, for the appellee, was as follows:

"The Court instructs the jury that reasonable care on the part of plaintiff's intestate, at the time of this accident, means that degree of care and caution, for his own safety, which an ordinary reasonable prudent child of his age would have exercised under similar circumstances."

The child was admittedly of the age of three years and eleven months. Being less than seven years of age, he was incapable of conduct which would amount to contributory negligence. McDonald v. City of Spring Valley, 285 Ill., at page 55. Chicago City Ry. Co. v. Tuohy, 196 Ill., 410. This instruction was not applicable to the case, and should not have been given, as its tendency could only be to confuse, or perhaps mislead, the jury. Moreover, the rule thus stated in the instruction, was in direct conflict with the principle correctly declared in instruction

number two, given for the appellant. This latter charged the jury that the parents of the child, and each of them, before and at the time of the accident, were under the duty of exercising the same degree of care, concerning the child, as an ordinarily prudent person would have exercised under like circumstances, and that if they failed so to do, no recovery could be had.

It is the settled rule, that while instructions are considered as a series, each should declare the law correctly, and they should be in harmony, in order that the jury may not be misled; as they cannot, from contradictory instructions, determine which one states the correct rule of law, and there is no way of determining which one the jury followed. Bald v. Neurnberger, 267 Ill., 616. The instruction, not being applicable to the facts of the case, and in contradiction to the second one given for appellant, was improper, and the Court erred in its giving.

The Court also, at the request of appellee, in her eighth given instruction, charged the jury as follows:

"The Court instructs the jury that contributory negligence is not available as a defense in bar of an action where the jury find the defendant or his agent was guilty of reckless or wanton conduct."

This being an abstract statement of law, must be accurate and not calculated to mislead the jury; otherwise it is erroneous. Ill. Match Co. v. C. R. I. & P. Ry. Co., 250 Ill., 396. The rule appears to be that it is only where willful or wanton conduct, for which the defendant is responsible, is a proximate

cause of the injury complained of, that negligence of the plaintiff, which proximately contributes thereto, does not bar a recovery. 45 Corpus Juris, 981, Sec. 533. This instruction was not restricted to reckless or wanton conduct of the appellant, which was the proximate cause of the injury, but left the jury to speculate upon what wanton conduct was intended, and was not a complete or accurate statement of the rule. Its obvious tendency was to leave the jury in doubt, and permit them to conjecture as to its meaning.

Upon the record, we are of opinion that the jury were not accurately instructed as to the law applicable to the case; for which reason the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.

4 23

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT.

OCTOBER TERM, A. D. 1952.

TERM NO. 28. AGENDA NO. 27

LOUISE KEILBACH, Appellee,	APPEAL FROM
vs.	CIRCUIT COURT OF
WALTER CLAYTON, Appellant.	MADISON COUNTY.

EDWARDS, J.:

On November 2, 1951, plaintiff, with her husband and son, were husking corn a few miles from the Town of Highland, while in a near by field, the defendant and his father-in-law, were similarly engaged. At about five o'clock in the afternoon, all parties stopped work; plaintiff, her husband, and son, started for home in a farm wagon, to which was hitched a team of mules, driven by her husband. The wagon box was filled with corn; she was sitting on the right side, with her feet hanging over. The road thus traveled, was dirt, and they had no lights attached to the wagon; it then being dark, or becoming so.

The defendant took a load of corn to the place of his father-in-law, unloaded same, and then started for home in his automobile, over the same road plaintiff was using, and following the latter. When they had gone some distance, an auto, with lights burning, approached from the other direction, driven by one Foister. Plaintiff's husband turned to the right to let Foister pass, and defendant, being close to the rear of plaintiff's vehicle, with his head lights burning, crashed into the rear end of wagon. As a result, plaintiff was thrown to the ground; the rear wagon wheel

passed over her left elbow, breaking off a fragment of the bone, and causing a laceration upon the arm half an inch wide and half an inch deep.

Defendant took plaintiff in his car to the office of Dr. Kempf, at Highland, who directed that she be taken to St. Joseph's hospital, where her wound was X-rayed, showing the injury mentioned. Plaintiff states that she smelled liquor on the breath of defendant; he denies that he had been drinking, though his father-in-law, Weisse, testified that he and defendant, during the noon hour of that day, drank some wine. The evidence further shows that defendant, while at the hospital, and talking of the accident, said, in effect, that he was guilty; a statement which he did not deny, though he testified in the case.

Dr. Kempf gave plaintiff some treatment; her arm was placed in splints, and she was taken home. It appears that she wore the splints for some six weeks, and suffered considerable pain; that it was expected the fractured fragment of bone would dissolve; it, however, failed to do so. Plaintiff continued to suffer pain, and on May 12, 1932, Dr. Kempf performed an operation at the hospital, removing the bone fragment, which he stated was the size of a butter bean. She remained in the hospital from Thursday until Sunday, when she returned to her home. During the intervening period, between the accident and the operation, she was not able to do much work, which necessitated her married daughter leaving her own home and coming to that of plaintiff, to assist in housework. There was no proof that the injury would permanently incapacitate her from performing her usual duties, though the doctor testified that the pains might give her trouble off and on. The doctor's bill, in the sum of $140.00, was unpaid at

the time of the trial, likewise the hospital charge, though its amount was not shown.

Plaintiff brought suit for the injury; there was a verdict for $1,750.00; motion for a new trial, which was overruled, and judgment entered for the amount; from which this appeal is prosecuted.

Two grounds for reversal are argued; first, that the court erred in the giving of one of plaintiff's instructions; secondly, that the ver dict is excessive.

The instruction complained of, in substance is, that the statute does not require lights upon a horse drawn vehicle, driven over a dirt road, but that the requirement only applies to such vehicles as are drawn over durable hard surfaced state highways, during the period of from one hour after sunset, until one hour before sunrise. Objection is made that the instruction is an abstract legal statement, not applicable to the facts of the case, and that it ignores the question of possible contributory negligence on the part of plaintiff. Defendant's position, as stated on page 7 of his brief, is that plaintiff and her husband were engaged in a common enterprise at the time of the accident, and that she was contributorily negligent in proceeding at night, on a dirt road, in an unlighted horse drawn vehicle, driven and owned by her husband, her associate in the joint enterprise.

At the instance of the defendant, the following instruction was given:

"The court instructs the jury that if from the evidence you find that the plaintiff and her husband were engaged in a common enterprise, and that the trip in the wagon, during which the

accident occurred, was a part of, or in furtherance of the enterprise, then any negligence in the operation of their wagon was the plaintiff's negligence, and if you find that such negligence existed, then your verdict shall be for the defendant."

No question has been raised that the plaintiff's instruction is not a correct statement of the law, so far as it goes, and it will be observed that defendant's instruction, just quoted, fully covers the question of plaintiff's possible want of due care for her own safety. Where an instruction does not, in words or effect, direct a verdict, its failure to include each element, will not work a reversal, where all that is set forth, is correctly stated, and the part which is omitted is supplied by other instructions; the rule being that the entire charge must be considered as a series. Peoria & Pekin Ry. Co. v. Schantz, 326 Ill., 506. West Chicago St. R. R. Co. v. Schulz, 217 Ill., 322. As to the first objection, that the instruction is an abstract legal proposition, not applicable to the facts, the law is that a given instruction, which correctly states an abstract proposition of law, is not sufficient reason to reverse a judgment unless it appears that it tended to mislead the jury. Beidler v. King, 209 Ill., 302. Here the proof clearly establishes the liability of the defendant, as charged, and we are of opinion that the instruction did not mislead the jury.

Upon a careful consideration of the evidence, we think that the verdict and judgment were excessive, considering the character and extent of the injuries. If plaintiff will file, in the office of the clerk of this court, within fifteen days, a remittitur in the sum of $550.00, judgment will be affirmed in the amount of $1,200.00; otherwise the judgment will be reversed

TERM NO. 28.

and the cause remanded.

AFFIRMED UPON REMITTITUR.

Not to be reported in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.
OCTOBER TERM, A. D. 1952.

TERM NO. 29. AGENDA NO. 21.

269 I.A. 666

DOROTHY WOLFE, Appellee.
vs.
ROY HUNT, et al., Appellants.

Appeal from
Circuit Court of
Lawrence County.

EDWARDS, J.:

This is an action of trespass instituted by Dorothy Wolfe, appellee, against Roy Hunt, Ada Hunt and Franklin Shaw, appellants. The declaration consists of three counts, the first charging that appellants assulted and beat appellee, the second alleging that they forcibly entered a cafe operated by her, and by noise and tumultuous conduct, disturbed her in its possession and operation, and the third count setting forth that they broke and entered her place of business and expelled her from the possession, use and occupation thereof.

Appellants filed the general issue, and two special pleas, neither of which were abstracted by appellants, and appellee has not supplied the defect by supplimental abstract.

A jury absolved Shaw from liability, and found the Hunts guilty; assessed the appellee's damages at $300.00, and judgment was rendered for this amount against Roy Hunt and Ada Hunt, from which they have appealed.

On January 7, 1930, appellee and her mother purchased of appellants, Roy Hunt and Ada Hunt, husband and wife, a cafe in St. Francisville, for the sum of $3,000.00. A down-payment of $200.00 was made, and a note given for $2,800.00, to be paid in

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.
OCTOBER TERM, A. D. 1952.

TERM NO. 29. AGENDA NO. 21.

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monthly installments. The note recited that as collateral security, all fixtures on hand in the cafe were deposited for that purpose, and the holder was given authority to sell same at any time the securities should depreciate in value, and apply the proceeds to satisfaction of the debt.

On November 24, 1930, appellee, who was operating the cafe, became in arrears in her payments, and appellant, Roy Hunt, went to the place of business at 9 o'clock A. M., and had a talk with appellee about turning the place back to him and his wife. The testimony as to events from here on is conflicting. On the part of appellee, it tends to show that when Hunt asked for possession, she refused; that he remained around the place until evening; that he then procured Shaw, the city marshal, to enter the place; that the latter took hold of appellee, pushed her, and told her she would have to leave, and at the same time ordered out some customers who were in the place.

Appellants' evidence is to the effect that when Hunt approached appellee to turn over the business, he asked her if she would go peaceable, or whether she wanted papers served upon her; that she said there was no use of having any trouble, and that she left in about an hour. That she returned in the evening; that he thereupon secured Shaw to serve the paper, meaning the note, which Hunt regarded as being in the nature of a chattel mortgage. That Shaw asked for the key; that she told him where it was; that he procured same, and that she left the place of her own accord. That she was not touched by Shaw, nor was there any other violence offered her. Hunt further testified, without objection, that at such time he was representing both himself and his wife, Ada Hunt, though the latter was not present. That appellee returned two

days later, sat down, and would not leave; whereupon Hunt replevined the chattels in the cafe, and continued in possession thereafter.

The assignment of errors is based upon the following grounds: That the court erred in refusing to direct a verdict for appellants at the close of plaintiff's case, and also at the close of all the evidence; that the court improperly overruled appellants' motions for a new trial and in arrest of judgment, and that judgment was wrongfully entered on the verdict.

Motions were made to direct a verdict, at the close of plaintiff's case, and also at the conclusion of all the evidence. It appears that the motions were accompanied by forms of verdict, but that no written instructions were submitted therewith. A motion to direct a verdict must be accompanied by an instruction in writing, which the court is asked to give to the jury, If no such instruction is tendered, the alleged error of the court in denying the motion, cannot be considered upon review of the case. Calumet Electric St. Ry. Co. v. Christenson, 170 Ill., 383. West Chicago St. R. R. Co. v. Foster, 175 Ill., 396. No such written instructions were offered with the motions, hence the questions are not saved. The forms of verdict submitted were not the equivalent of instructions.

As to the motions for a new trial, and in arrest of judgment the abstract discloses that such motions were made; it, however, fails to show that the court ruled upon either of such motions, and fails to show any exceptions by appellants to the rulings of the court thereon. In an Appellate Court, the abstract is the pleading of the party filing same, and whatever is sought to be reviewed upon the record, must be contained in that pleading.

TERM NO. 29.

Gage v. City of Chicago, 211 Ill., 109. McGovern v. City of Chicago, 202 Ill. App., 139.

Where the abstract does not set forth the ruling of the court in motions of this character, and the exceptions to same, no question in relation thereto is preserved for review; as held by this court in Davis v. Home Insurance Co., 233 Ill. App., 566. The abstract failing to show any ruling on such motions, or exceptions thereto, the questions are not properly before this court for consideration. While a reviewing court may examine the record for the purpose of affirming a judgment, it will not do so to seek grounds for reversal, where the abstract is not sufficiently full to make manifest the errors complained of, without examination of the record. The People v. Southern Gem Co., 332 Ill., 370.

Appellants have also argued other matters, none of which are presented by the assignment of errors, hence they cannot be considered. Waggener v. Sawyer, 267 Ill., 32. Swift & Co. v. Fue, 167 Ill., 443.

Under the assignment of errors, as made, and from the record as abstracted, we find no error which would authorize reversal of the judgment.

JUDGMENT AFFIRMED.

Not to be reported in full.

25-A

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT.

OCTOBER TERM, A. D. 1932.

TERM NO. 4. AGENDA NO. 1.

NORA B. FORESTER, Administratrix of the Estate of John W. Forester, Deceased, Appellant,	APPEAL FROM CIRCUIT COURT OF SALINE COUNTY.
vs.	
CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, a Corporation, Appellee.	

FULTON, J.:

The Appellant brought suit in the Circuit Court of Saline County against the Carrier Mills Utilities Company, a Corporation, for the negligent killing of John W. Forester, the husband of the Appellant and on February 4, 1927 recovered a judgment of $4000.00 and costs. This is an action of debt brought against Appellee on said judgment, the Appellant contending that the Carrier Mills Utilities Company, a corporation, transferred to Appellee all of its property while the original suit was pending and that such transfer constituted a merger or consolidation under the statute, making Appellee liable for the indebtedness of the Carrier Mills Utilities Company.

The appeal to this Court is brought from a judgment of the Circuit Court of Saline County, rendered in favor of Appellee after Appellant's election to abide by a general demurrer, which was overruled, to Appellee's Sixth Plea to Appellant's amended declaration. The judgment order of the Court provided that the Appellant take nothing by her suit; that the Appellee go hence without day and that judgment be entered against the Appellant for costs.

TERM NO. 4.

The amended declarati n alleged in substance that on August 1, 1924, the Carrier Mills Utilities Company, an Illinois Corporation, sold its properties to Appellee, Central Illinois Public Service Company, also an Illinois corporation, for a consideration of $36,200.00; that at the time there was pending in the Circuit Court of Saline County an action in case theretofore brought against the Carrier Mills Company, by the Appellant, for damages caused by the wrongful death of Appellant's intestate; that said cause was filed in said court on the 1st day of November, 1919, and thereafter tried and judgment for Appellant entered on February 4, 1927, for $4000.00 and costs; that on August 1st, 1924, the Carrier Mills Company transferred to Appellee all of its property of every kind and character and that Appellee paid $36,200.00 to two individuals, being the two largest stockholders of the Carrier Mills Company, by first delivering to them 426 shares of Appellee Company, and then immediately re-purchasing the said stock at $85.00 per share, the two individual stockholders receiving all the proceeds from said sale. That by reason of the transfer aforesaid the Appellee and the Carrier Mills Utilities Company became merged and consolidated and the Appellee became liable for the judgment obtained by Appellant against the Carrier Mills Company.

Issue was joined on all the pleas filed to the declaration except Special Plea number six, to which Appellant filed a general demurrer. The Sixth Plea of Appellee set forth in detail the manner and method by which it acquired the property of the Carrier Mills Utilities Company, particularly setting forth the action and approval of the stockholders and directors of the Carrier Mills Utilities Company authorizing the sale of its property (except cash on hand, book accounts and bills receivable,

TERM NO. 4.

which were not included in Appellee's purchase) for a consideration of 426 shares of Appellee's capital stock, and also authorizing a subsequent sale of said stock for cash. The plea further set up the authority given Appellee for the purchase of said property and the issuance and delivery to the Carrier Mills Company of the stock of Appellee in exchange for said property, from the Illinois Commerce Commission; also compliance with the Bulk Sales Act; that at the time of the purchase of said property Appellee had no knowledge of the claim of Appellant; that the 426 shares were transferred direct to the Carrier Mills Company itself; that the shares were immediately transferred back to Appellee by the Carrier Mills Company and that in payment the Appellee paid $36,200.00 direct to the Carrier Mills Company and not to any stockholder or to any individual or individuals whatsoever. The plea also sets up the reason for Appellee's original payment in shares of its capital stock and its immediate re-purchase of them. It states that Appellee had several thousand stockholders and there was a demand for its stock and it desired to have treasury stock available to meet this demand. Stock originally issued was required to be first offered to its stockholders before sale to others, whereas treasury stock did not have to meet with such requirement, and the expense of issuing and redeeming subscription rights from all its stockholders from an issue of this size was almost prohibitive because of the expense that would necessarily be incurred; that after the transfer the Carrier Mills Company still owned and retained a portion of its original property; that it still retained its legal entity, was still authorized to transact business under its charter from the State of Illinois, and that Appellee never assumed or agreed to pay any debts or obligations of the

TERM NO. 4.

Carrier Mills Utilities Company. Appellant complains because its demurrer to this plea was overruled.

In their argument counsel for Appellant dwell on the fact that the entire transaction concerning the transfer of property between the two utility corporations were carried on between Appellee and two individual stockholders, Kimmel and Taborn, and that the entire consideration was paid to these two individuals. Therefore, it is asserted that a consolidation took place and urge in support of their contention the case of C. S. F. &. C. Ry. Co. vs. Ashling, 160 Ill. 375, where the purchasing company secured not only the property but also the stockholders. New stock was issued to the stockholders of the selling company, dollar for dollar in the purchasing company. The selling company was left without property, corporate rights or franchises of any kind and without stockholders. The plea in question discloses no such state of facts. It clearly sets out a purchase of only a portion of the assets, distinctly excepting cash on hand, book accounts and bills receivable. It shows the retention of the franchise and right to transact business on the part of the Carrier Mills Company. It shows that the entire transaction respecting the transfer and including the payment of the consideration was carried on directly with the Carrier Mills Utilities Company, all with the approval of its stockholders, besides other facts set forth in this opinion.

This record raises only the sufficiency of this Sixth plea of Appellee. A demurrer involves only such facts as are alleged in the pleading demurred to and raises only questions of law as to the sufficiency of the pleadings which arise on the face thereof. Wood v. Papendick 268 Ill. 383.

TERM NO. 4.

A plea is good as against a demurrer whenever it, in plain and simple language, states sufficient ultimate facts to constitute a defense to the cause of action set up in the plaintiff's declaration.

Taylor v. Southern Ry. Co. 350 Ill. 147.

Taking all the facts as set up in the Plea as true, we believe that it states a good defense.

Bruffet, et al vs. Great Western R. R. Co. 25 Ill. 310
Morris vs. Interstate Iron & Steel Co. 257 App. 613.

The Circuit Court was correct in overruling the demurrer of Appellant to Appellee's Sixth Special Plea, and its action is hereby affirmed.

AFFIRMED.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.

OCTOBER TERM, A. D. 1952.

Term No. 19. Agenda No. 28.

N. C. MCLEAN, ET AL, APPELLEES,	
VS.	APPEAL FROM EAST ST. LOUIS CITY COURT.
ADRIAN J. DEHAAN, APPELLANT.	

BARRY, P. J.

Appellees sued to recover a debt of $250.00. Appellant did not deny that he owed the debt, but claimed a set-off of $450.00. A jury was waived and the Court found the issues in favor of appellees, assessed their damages at $250.00 and rendered judgment for that amount.

Appellant borrowed $1300.00 from a bank for which he gave his note, to secure the payment of which he pledged a note and mortgage for $1750.00. After the note became due appellees paid the bank the amount of the note and secured the $1750.00 note and mortgage from the bank and collected the full amount thereof. Appellant claimed the difference, $450.00, as a set off and appellees claimed that the note and mortgage were the property of appellant's wife and that they had paid the $450.00 to her.

Appellant testified that the note and mortgage were owned by his wife but before they were pledged to the bank he gave her shares of stock in the Port Huron Company to the amount of $5500.00 for the note and mortgage and that at the time they were pledged to the bank they were his property. The wife was called as a witness

for appellees and she testified that she purchased the note and mortgage from appellees but she did not deny the sale of the same to her husband before he pledged them to the bank. Neither did she testify that she held or owned the note and mortgage at the time they were pledged to the bank. It clearly appears therefore from the undisputed testimony of appellant that he had purchased them from his wife before they were pledged. That being true he was entitled to his set-off and the judgment is reversed and a judgment in favor of appellant and against appellee for the sum of $200.00 is rendered in this Court. Appellees will pay the costs in this Court.

REVERSED AND JUDGMENT
ENTERED IN FAVOR OF APPELLANT
FOR $200.00.

The clerk will enter in the
judgment the following:-
"The Court finds that appellant was the owner of the note and mortgage in question and is entitled to recover $450.00 from appellees, that being the amount realized by appellees on said note and mortgage over and above the amount of the note of appellant to the bank and which was paid by appellees and that appellant is entitled to a judgment against appellees for $200.00."

Not to be reported in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.
OCTOBER TERM, A. D. 1952.

TERM NO. 30. AGENDA NO. 25.

PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs. GEORGE BIEHL, Appellant.	APPEAL FROM ST. CLAIR COUNTY COURT.	269 I.A. 665

BARRY, P. J.:

Appellant was held in contempt of Court for a failure to comply with the order of the Court in a proceeding under the Paupers Act and was fined $150.00 and costs. The order which he failed to comply with is based upon a complaint filed by the State's Attorney which charged that Mrs. Arthur Biehl, Myron, Kenneth, Arthur and Rolland Biehl are pauper persons and unable to earn a livelihood in consequences of bodily infirmity or other unavoidable cause; that George Biehl and D. J. Kronenberger are grandparents of said children and are of sufficient ability to support said children but have neglected and failed so to do, contrary to the Statute. It prayed for summons against the grandparents above named and no one else. The complaint was wholly insufficient to give the County Court jurisdiction of the subject matter and the order entered thereon is null and void. Brown v. VanKeuren, 340 Ill. 118. That being true the Court had no jurisdiction, power or authority to impose a fine upon appellant for a failure to comply with the order entered upon said complaint. The judgment is reversed.

REVERSED.

Not to be reported in full.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT.

OCTOBER TERM, A. D. 1952.

TERM NO. 31. AGENDA NO. 22.

CHARLES FOULK, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
ALCOA ORE COMPANY, Appellant.	)	ST. CLAIR COUNTY.

BARRY, P. J.:

Appellee recovered a verdict and judgment for $100.00 for damages to his crop of horseradish alleged to have been caused by gases and fumes from appellant's plant. A careful consideration of the case leads to the conclusion that we would not be warranted in holding that the verdict is so manifestly against the weight of the evidence that it should not be permitted to stand. It is argued that the Court erred in allowing appellee to testify as to how much horseradish he raised in another field and the price received therefor. Appellant made no objection as to what the other field produced. When appellee was asked and had answered that he received six cents per pound for that crop appellant interposed an objection which was overruled. There was no motion to strike the answer. Appellant is in no position to question the sufficiency of the proof as to the measure of damages. No reversible error has been called to our attention and the judgment is affirmed.

AFFIRMED.

Not to be reported in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.

MAY TERM, A. D. 1932.

TERM NO. 13. AGENDA NO. 18.

REHEARING NO. 1. OCTOBER TERM, A. D. 1932.

WAVERLY MANEES, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT OF
OTTO FINGER, Appellant.	)	ALEXANDER COUNTY.

EDWARDS, J.:

This action was begun before a Police Magistrate, where, upon a hearing, judgment was entered for Appellee, from which Appellant appealed to the Circuit Court, where a trial was had before a jury, who returned a verdict for Appellee in the sum of $200.00, upon which judgment was rendered, and from which this appeal was taken.

The cause grew out of the following situation: In December, 1929, Appellant purchased a farm, which Appellee occupied as a tenant. The latter had, the previous spring, sown eight acres of the land to alfalfa hay. February following, Appellant, who wished to move on to the farm, talked with Appellee about vacating the place, and an agreement therefor was reached. Appellee contends that as a part of same, he was to cut the eight acres of hay, have one-half for himself, and deliver the balance to Appellant, by placing it in the latter's barn. The testimony of Ralph Curley, who was present, and a listener at the conversation, fully corroborates the claim of Appellee in such respect. Appellant denies the alleged agreement relative to the hay.

TERM NO. 13.

It appears that in April, 1930, appellee talked with appellant about the hay, and was forbidden by the latter to enter the field. Appellant, on cross examination, admitted that he told appellee to keep off the hay land, and that later on he, himself, caused the hay to be cut and put up. The evidence shows that about thirty-two tons of hay were grown that season upon the eight acres, and the testimony of different witnesses, as to its value, fixes same at from fifteen to twenty-five dollars per ton.

Appellant, in the first paragraph of his argument, states, "As will be noted from the evidence in this case, the one and only disputed question is, whether or not the parties hereto made any agreement in regard to the hay grown upon the eight acres of land in question, in the year 1930." This is a direct admission that the only controverted question of fact is as to the execution of the contract, and renders unnecessary a consideration of other facts, as they are thus admitted.

Both appellee and Ralph Curley testify that the agreement to rent the hay land was entered into between the parties to the action. This is denied by appellant. There was no other testimony on the propostion. The evidence was conflicting; the jury saw and heard the witnesses, and had opportunities superior to our's for determining their credibility. It seems to us that they were well warrented in their finding, that the alleged contract was entered into, as claimed by appellee. He did not cut and put up the hay; this he admits, but claims he was prevented from so doing by the order of appellant to keep out of the hay field; and the latter testified that he forbade him going upon the ground. This fact is clearly proven, and not contradicted.

It does not admit of doubt that appellee was ready and willing, and desired, to make the hay, and would have done so had he not been for bidden by appellant. We find no circumstance in the evidence to the contrary. It is also clearly proven that the share of the hay, which belonged to appellee, and which was cut and converted by appellant, was worth the amount fixed by the verdict. It is thus seen that the jury being justified in finding for appellee upon the only point which appellant, as above stated, has charged was a matter of dispute, and the remaining propositions being clearly extablished by the evidence in favor of appellee, this court would not be warranted in disturbing the verdict.

Appellant contends that the court erred in overruling his motions for directed verdicts made at the close of plaintiff's case, and also at the close of all the evidence. What has been said in discussion of the proof, is a sufficient answer to this contention. The court rightly overruled both motions.

It is further urged that the requested charge of appellant, which was refused, "You are instructed that the law in this state is that no recovery can be had upon the theory of constructive service or performance," should have been given, and that the action of the court in refusing same was error.

The phrase, "constructive service or performance," is not defined in this or any other given instruction, nor was the rule concretely applied to the facts in the cause. Under such circumstances, the refusal to give, as an instruction, an abstract legal proposition, is not error. Kenyon v. Chicago City Ry. Co., 235 Ill., 406.

TERM NO. 13.

At the instance of appellee, the court gave to the jury the following instruction:

"The court instructs the jury that if they believe from the evidence that a contract of leasing the hay land in question was made by the plaintiff and the defendant, then in that event the plaintiff is entitled to his share of the crops grown upon said land, in accordance with the terms of the said lease or contract."

Appellant makes a somewhat involved criticism of this instruction. If we understand him correctly, his objections are, that it omits the elements that appellee must have performed the contract on his part, or that, being ready and willing to perform, he was prevented or excused from its performance by appellant. The instruction is subject to the latter criticism. C. I. & W. Ry. Co. v. Baker, 130 Ill. App., 414. However, in the state of the record, it was not such error as will work a reversal of the judgment.

Relative to the first objection, as previously shown, appellee admitted that he did not perform his part of the contract, and as he is not relying upon performance, by himself, as a ground for recovery, the question was not in the case, and the court could not properly charge in regard to it. As to the latter exception, the uncontradicted testimony is that he was prevented from performing, by the order of appellant to keep out of the hay field. Not only is this fact undisputed, but it is corroborated by the testimony of appellant, that he did forbid him to go upon the land. All of the testimony bearing upon the question whether appellee was ready and willing to perform, tends to extablish the affirmative of the proposition, and there is no evidence to the contrary.

TERM NO. 13.

It is not error to omit any reference to a clearly established and wholly undisputed fact, in an instruction "intended to predicate the grounds upon which a recovery can be had. It is only necessary, in such an instruction, that all the disputed facts or issues of fact necessary to a recovery, should be included in the instruction;" as held by this court in C. & A. Ry. Co. v. Tracey, 109 Ill. App., 563, and also in Neumann v. Naumann, 147 Ill. App., 219.

In I. C. R. R. Co. v. King, 179 Ill., 91, a personal injury case, the court charged the jury that if they believed from the evidence that the injury complained of, was wantonly and wilfully inflicted, as charged in the declaration, that plaintiff was entitled to recover, though the jury believed that he was guilty of some negligence. Objection was made that the instruction omitted the necessary element of proof, that the servant of defendant, at the time the injury was inflicted, was acting in the line of duty, or within the scope of his employment. The court held that the instruction was defective, as claimed, but inasmuch as the uncontradicted evidence showed that the servant was acting within the scope of his employment at the time, that the defendant was not prejudiced by the omission, and that it was not sufficient to reverse the judgment; and to the same effect are, Compher v. Browning, 219 Ill., at page 447; Petersen v. E. A. & S. Traction Co., 238 Ill., at page 410.

The evidence being uncontradicted, that appellant refused to permit appellee to enter the hay field, which prevented him from performing his part of the contract, and the proof clearly showing that he was ready and willing to perform, with no evidence to the contrary, the giving of the instruction,

under the authorities cited, was not reversible error.

A further criticism of the instruction is, that it reads, "if the jury believe from the evidence," and does not require the jury to believe from the preponderance of the evidence. It appears that in other instructions, the jury were positively told that appellee, to recover, must prove his case by a preponderance of the evidence, otherwise they should find for appellant. Where this is true, such defect will not reverse; as ruled by this court in Hitz v. I. C. R. R. Co., 183 Ill. App., 558; and Horn v. Thimmig, 41 Ill. App., at page 526.

Upon consideration of this record, we are of opinion that the judgment should be affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

Case No.)

Waverly Manees, appellee, v. Otto Finger, appellant.

Error to the Municipal Court of Chicago;
Superior Court of Cook county;
Appeal from the Circuit Court of county;
County Court of county;
The Hon. , Judge, presiding. Heard
in the division of
this court for the first district at the term,
Affirmed
Reversed
Reversed and remanded with directions.

Opinion filed Rehearing denied

for appellants.

for plaintiffs in error.

for appellees.

for defendants in error.

PRESIDING JUSTICE delivered the opinion of the court.

STATE OF ILLINOIS.
APPELLATE COURT.
FOURTH DISTRICT.

MAY TERM, 1932.

TERM NO. 13. AGENDA NO. 18.

WAVERLY MANEES, Appellee.	APPEAL FROM CIRCUIT COURT OF ALEXANDER COUNTY.
VS.	
OTTO FINGER, Appellant.	

EDWARDS, J:- In December, 1929, appellant purchased a farm, which appellee was occupying as a tenant. The latter had, the preceding spring, sown eight acres of the land to alfalfa hay. The following February appellant, desiring to move upon the place, talked with appellee about vacating the farm, and an agreement to that end was entered into. Appellee contends that, as a part of same, he was to cut the eight acres of hay, have one-half for himself, and deliver the remainder to appellant, by placing it in the latter's barn. The testimony of Ralph Curley, who claims to have been present and heard the conversation, fully supports the claim of appellee. Appellant denies the alleged agreement relative to the hay, and maintains that when appellee mentioned the matter, he said he could not let him have any

hay, and that he would have to see him about it later.

In April, 1930, appellee, accompanied by Curley, went to the home of appellant, to arrange about cutting the hay, and was forbidden by the latter to enter the field. Appellant admits he told appellee to keep off the hay land, and claims that appellee told him to do likewise. After this, appellee made no effort to put up the hay.

The proof shows that about thirty-two tons of hay were grown that season upon the eight acres, and the testimony of the witnesses, as to its value, fixes same at from fifteen to twenty-five dollars per ton.

Suit was brought by appellee, before a Police Magistrate, to recover the value of one-half the hay. A jury found in his favor and awarded damages in the sum of $225.00. The case was appealed to the Circuit Court, where it was twice tried; first before the Court, then before the Court and a jury. Both times the issue was found in favor of appellee, in the sum of $200.00. Judgment having been entered for this amount, the appellant prosecutes this appeal.

The grounds relied upon for reversal are that the judgment is not sustained by the evidence, and the action of the Court in the giving and refusing of instructions.

As to the first proposition, the evidence on the question whether a contract for the leasing of the hay land, and the division of the product grown thereon, was entered into by the parties, was conflicting. The issue has been three times tried, - twice by juries, and once by the Court, with the same finding of fact each time. Where evidence is con-

flicting, and the facts have been judicially determined twice or more, the same way, and there is evidence tending to sustain the findings, the judgment will not be reversed on the facts; as ruled by this court in Gill v. Gill, 197 Ill. App., 211, and also held in Bates v. Danville St. Ry. & Light Co., 190 Ill. App., 486. We would not be warranted in disturbing the judgment as not justified by the proof.

Appellant tendered the following instruction, which was refused: "You are instructed that the law in this state is that no recovery can be had upon the theory of constructive service or performance."

What is meant by "constructive service or performance" was not defined in this or any other given instruction, nor was the rule concretely applied to the facts of the cause. Under such circumstances, the refusal to give, as an instruction, an abstract legal proposition, is not error. Forster et al. v. Peer, 120 Ill. App., 199. Latham v. Ry. Co., 164 Ill. App., 559. The instruction was properly refused.

Complaint is made of the Court's action in instructing the jury, at the instance of appellee, as follows:

"The Court instructs the jury that if they believe from the evidence that a contract of leasing the hay land in question, was made by the plaintiff and defendant, then in that event the plaintiff is entitled to his share of the crops grown upon said land, in accordance with the terms of the said lease or contract."

This instruction is subject to criticism, and might well

have been refused. However, in view of the record, we do not think appellant was damaged by its giving. The rule is that where facts have been three times determined the same way, the judgment will not be reversed for errors of law, unless they are material and clearly prejudicial. Parmly v. Farrar, 204 Ill., 41. City of Chicago v. McNally, 128 Ill. App., 375.

We do not think the giving of this instruction can be said to be so palpably harmful as to have worked an injury to appellant.

Upon the whole record, we are of opinion that substantial justice has been done, and the judgment will be affirmed.

Judgment affirmed.

Not to be reported in full.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT.

OCTOBER TERM, A. D. 1932.

TERM NO. 14. AGENDA NO. 12.

The Fidelity Trust Company, etc., Appellant,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
Aloys Gundlach, Appellee.	)	ST. CLAIR COUNTY.

Edwards, J.

On June 15, 1925, John P. Gundlach, Aloys Gundlach and Joseph E. Gundlach, entered into the following written agreement:

"This agreement, made and entered into this fifteenth day of June, A. D. 1925, by and between John P. Gundlach, Aloys Gundlach and Joseph E. Gundlach, witnesseth:

That whereas Aloys Gundlach is this day indebted to John P. Gundlach for the sum of fifty-six thousand eight hundred and twenty-eight and 81/100 ($56,828.81) dollars, which amount has been agreed upon by John P. Gundlach and Aloys Gundlach to be correct, and whereas John P. Gundlach is desirous to have additional assurance of the payment of the same, and whereas Aloys Gundlach and Joseph E. Gundlach are about to negotiate a lease upon their coal mining properties and the capital stock of the Caseyville Railway Co., with G. L. Tarlton and O. E. Schaefer, with the option and privilege to buy said mining properties and said capital stock, now therefore it is agreed by the parties hereto that if the above option is exercised, that all moneys received in excess of one hundred thousand ($100,000.00) dollars shall be applied on the above amount of fifty-six thousand eight hundred and twenty-eight and 81/100($56,828.81) DOLLARS, due John P. Gundlach from Aloys Gundlach, until the same has been fully paid, plus six per cent interest from this date until paid.

Aloys Gundlach hereby agrees that the above is his personal obligation, and if paid as provided above that he will reimburse Joseph E. Gundlach to the extent of one-half of the amounts paid.

This agreement shall be binding upon our heirs, administrators, executors, successors and assigns.

In Witness Whereof we have hereunto set our hands and seals the day and year first above written.

John P. Gundlach (Seal)
Aloys Gundlach (Seal)
Joseph E. Gundlach (Seal)

TERM NO. 14.

Later, John P. Gundlach having died, appellant, as administrator of his estate, sued appellee Aloys Gundlach, in the Circuit Court of St. Clair County, upon such instrument. The declaration consisted of four counts; the first two of which, after some preliminary motions, were withdrawn.

Count number three charges that appellee, being indebted to John P. Gundlach, executed the agreement in question, and in and by its terms obligated himself, and promised to pay said sum to said John P. Gundlach upon request.

The fourth count alleges that said indebtedness existing, appellee, in consideration thereof, executed and delivered to appellant's intestate the written instrument, as an acknowledgment of the indebtedness, and further avers that same is an evidence, in writing, of such indebtedness, by which appellee became obligated to pay John P. Gundlach, on demand, the sum therein mentioned, with interest.

To these two counts a demurrer was filed, which the court sustained; appellant elected to stand by the declaration, judgment was given for appellee, and this appeal has resulted.

It will be observed that the third count alleges a promise by appellee to pay John P. Gundlach, upon request, the sum stated to be owing. The only express promise in the entire writing is the agreement which pledges certain proceeds, to be derived from the lease or possible sale of certain coal properties and railroad stock, in excess of a certain amount, to the payment of the indebtedness. It contains no promise to pay the obligation, generally, but only in the manner as indicated. Appellant having pleaded an express promise, as being set forth in the written agreement, which

latter is averred according to its tenor, and the instrument containing no such promise as alleged, in our opinion the count did not state a cause of action, and the court rightly sustained the demurrer to same.

The fourth count presents a different situation. It avers the existence of the debt, and that in consideration of same, the agreement in writing was executed and delivered; that same is a written evidence of indebtedness, whereby appellee became obligated to pay to John P. Gundlach, on demand, the sum so stated to be in arrears.

Appellant, on page 8 of its brief and argument, states that this count is based upon the proposition that the writing is an acknowledgment of appellee's debt, and that from such arises an implied obligation to pay, upon demand, the amount so acknowledged to be due, with interest.

That the instrument acknowledges an indebtedness in the amount of $56,828.81, from appellee to the intestate of appellant, which same was agreed upon by the parties as the correct amount, does not admit of argument. It is an unqualified admission, by way of recital, on the part of appellee, that he was owing in such amount to John P. Gundlach. From such acknowledgment of the amount, as being an account stated between the parties, the law implies a promise on the part of the debtor to pay the balance so acknowledged to be due; State v. I. C. R. R. Co., 246 Ill., at page 241; and confers an immediate right of action, on demand, of the balance, with interest from the time the account was stated. 1. Ruling Case Law, p. 212, Sec. 10.

It only remains to consider whether the portion of the agreement, relative to the lease and sale of the coal lands and railroad

stock, has limited the right of recovery to the proceeds to be derived therefrom. The instrument expressly recites the existence of the indebtedness, and that John P. Gundlach desires additional assurance of the payment of the obligation. Nowhere does it appear that the agreement in any way restricts the right of appellant's intestate to be paid the amount of the debt, nor limit the payment to the fund to be derived from the lease or sale of the coal or railroad property; neither does it make the payment conditional upon such fund being so derived. The recital above mentioned, as to further assurance of payment, negatives any such inference, as its effect was to broaden the source, out of which the obligation might be satisfied, and create a fund wherewith to discharge same; which was to be additional, to any other rights in favor of John P. Gundlach, existent by virtue of the acknowledgment of the obligation, as the product of an account stated.

The liability in this count was based, not upon the promise with relation to the proceeds of lease or sale of the property mentioned, but was grounded upon the implied promise, which the law raises, where an account has been stated or acknowledged, to pay, upon demand, the amount so agreed to be due. The acknowledgment was absolute and without restriction, and created a right in favor of decedent, to demand payment of same, at any time thereafter.

We think the fourth count stated a cause of action, and that the court erred in sustaining the demurrer to same.

The judgment is reversed and the cause remanded, with directions to overrule the demurrer to the fourth count of the declaration.

Reversed and remanded with directions.

Not to be reported in full.

STATE OF ILLINOIS.

APPELLATE COURT

FOURTH DISTRICT.

OCTOBER TERM, A. D. 1932.

TERM NO. 12. AGENDA NO. 10.

269 I.A. 664

Ethel Fisher, Defendant in Error,	)	ERROR TO
VS.	)	CIRCUIT COURT
Elmer Westerhold, Plaintiff in Error.	)	MADISON COUNTY.

BARRY, P. J.

Mrs. Fisher sued and recovered a judgment for $2,000.00 on account of personal injuries received in a crossing collision in Wood River. The Edwardsville-Alton Road runs east and west and Wood River Avenue runs south from that road. State Aid Route No. 3, a concrete hard road, runs north on said avenue until it reaches the road aforesaid and turns west on that road at almost right angles. The road east of the avenue is made of earth and cinders. At the intersection the road and the avenue are thirty feet in width from curb to curb.

On October 31, 1929, about four o'clock P.M., Mrs. Fisher was driving east on the Edwardsville-Alton road and Mr. Westerhold was driving north on Wood River Avenue and the cars collided on the hard road a little north and east of the center of the intersection. Mrs. Fisher says that she stopped before entering the intersection with her front wheels at the west curb line of the avenue and that she waited two or three minutes for two cars from the south to pass; that after these cars had passed she looked to the south and saw no other car coming; that she could see three or four blocks south on Wood River Avenue and that there was no obstruction to her view. Her

brother was riding with her and he says that she slowed up at the crossing. She called Mr. Keller as a witness and he testified that he was driving his car and was about 150 feet west of the intersection; that he was driving at about 25 miles an hour and Mrs. Fisher entered the intersection at about 25 miles an hour without stopping or slowing down. The weight of the evidence is to the effect that she did not stop or slow down but entered the intersection at 25 miles per hour. The evidence shows that the block south of the intersection is 350 feet long and the next block is still longer.

Mr. Westerhold says that as he approached the crossing he had been going 25 miles an hour but reduced his speed to 15 miles per hour by the time he reached the south curb of the intersection; that Mrs. Fisher's car was then six or eight feet west of the west curb and she was going 25 miles per hour and he supposed she was going south on the hard road on Wood River Avenue but after she was upon the hard road she turned a little to the left as if she were going to cross the avenue and go on east; that it was then too late to avoid the collision. Mr. Norris was in the Westerhold car and his evidence is to the same effect.

While Mrs. Fisher testified that she looked south before she entered the intersection and says that no car was in sight, it is very evident that she could not have looked. She says that she did not see that other car until the moment of the collision. She had but one witness who testified as to the speed of the Westerhold car and he said that the car was going about 45 miles per hour. That being true the Westerhold car must have been in plain view if Mrs. Fisher had looked. The statute said to her that vehicles traveling upon public highways shall give the right of way to those approach-

ing along intersecting highways from the right. The great weight of authority is to the effect that a vehicle is approaching an intersection from the right within the meaning of the statute, and entitled to the right of way, when, on its left, on an intersecting street, another vehicle is approaching, whose driver, in the exercise of due care, would or should see that unless she allows the right of way their vehicles might or would collide.

It clearly appears that Mrs. Fisher entered upon the intersection without making any observation as to whether a car was approaching on Wood River Avenue or the speed thereof. There is no escape from the conclusion that if she had exercised ordinary care for her own safety she would have seen that unless she yielded the right of way the vehicles might or would collide. They did collide and she was guilty of contributory negligence which proximately cause her injury and the judgment is reversed with a finding of fact.

REVERSED.

the clerk will insert in the judgment the following:- "The Court finds that defendant in error was guilty of contributory negligence which was the proximate cause of her injury."
Not to be reported in full.

Gen. No. 8660 Agenda No. 5

OCTOBER TERM, 1932

Lena Hans, Defendant in Error,

-v-

John Riedlinger, Plaintiff in Error.

Error to the Circuit Court of Macon County.

SHURTLEFF, J.

This case comes by error from the Circuit Court of Macon County from a judgment rendered against plaintiff in error in favor of Lena Hans, defendant in error, on December 22, 1931, the October, 1931, term of said court, in an action of trespass on the case.

The declaration consists of nine counts. The first count charges an assault, with force and arms. The second count charges that the defendant, on July 19, 1931, with force and arms, etc., in the County of Macon and State of Illinois, assaulted the plaintiff and with great force drove his automobile upon a public street in the City of Decatur, to wit, North Twenty-second Street approaching and past a street railway car which had stopped south of the intersection of East Eldorado Street with Twenty-second Street for the purpose of receiving passengers, and that the defendant at said time drove his car within ten feet of the running board or lowest step of said car without the express direction of a traffic officer, which was then an unlawful act, and in the doing of which and as a direct result of his said unlawful act the defendant drove his car upon the plaintiff.

The third count charges, in substance, that plaintiff in error assaulted the defendant in error with a certain automobile.

The fourth count charges in the following language, that on July 19, 1931, the defendant while driving an automobile upon North Twenty-second Street, south of its intersection with East Eldorado Street in Decatur, Illinois, upon which Twenty-second Street was a certain street railway track which terminated at East Eldorado Street; that it was the custom of street cars on said track to receive and discharge passengers at said point and which practice and custom was known to defendant; that the street passes through a closely built up business portion of Decatur, much frequented by vehicles and pedestrians, all of which were known to the defendant; that the defendant drove his car in a southerly direction upon the west side of the street, at which time a street railway car was stopped and standing for the purpose of receiving and discharging passengers at said point, and in plain view of the defendant, and that the defendant wantonly approached and drove his automobile past said street car on the west side thereof within ten feet of the running board or lowest step, at a speed greater than was reasonable and proper, to wit, twenty-five miles per hour, and without sounding any warning or having his automobile under control, that he could stop the same to avoid injury to pedestrians lawfully in said Twenty-second Street, and with conscious indifference to the consequences which might be occasioned by his said acts, and by means whereof, he wantonly and recklessly drove his car upon and against the plaintiff as she was then walking in said Twenty-second Street near the southern end of said street car above mentioned, preparatory to boarding same and knocked her to the pavement, wantonly and recklessly injuring her, etc.

The fifth and sixth counts in substance charge general negligence. The seventh count charges that plaintiff in error failed

and omitted to have said automobile under his reasonable control. The eighth count charged that plaintiff in error drove his car to, past and around said street car and improperly drove the same in that it was being operated at a speed greater than was reasonable and proper, considering the traffic and use of the way and so as to endanger the life or limb of the plaintiff, to wit, at a speed of twenty-five miles per hour, and that said street passed through a closely built up business portion of said City of Decatur.

The ninth count charged that plaintiff in error failed to keep a proper lookout ahead in said street in the path of said car.

All of the counts for negligence allege that defendant in error was in the exercise of due care and caution for her own safety. There was a plea of the general issue and a stipulation that plaintiff in error could offer any competent evidence that could have been offered under any special plea that might have been filed.

The intersection where the collision or accident occurred is located in the northeast section of the City of Decatur, North Twenty-second Street running north and south and East Eldorado Street running east and west. Both streets are paved. On Twenty-second Street is a single street car track in the middle thereof. The tracks extend into Eldorado Street about five feet. On the northeast corner of the intersection is the office building of the A. E. Staley Company, a considerable distance north and east of the intersection. A factory building of said company is located about a block and a half from the northwest corner of the intersection, and there are no buildings between the intersection and the factory building. On the southwest corner of the intersection is a filling station operated by the Phillips Petroleum Company. This station faces north and the pumps run east and west. This station is approximately seventy feet in width along Twenty-second

Street. The approach is of concrete construction and slopes up to the sidewalk from the street. The curb has all been removed. South of this filling station lot is a restaurant known as the Little Gem, a one-story building facing east. On the east side of Twenty-second Street and south of Eldorado Street are a number of residences. Eldorado Street is forty feet wide from curb to curb. The street car rails are four feet eight and one-half inches from gauge to gauge. From the west rail to the west curb line is 12.64 feet, and from the east rail to the west curb line is 12.64 feet. The distance from the west curb to the property line is 15.02 feet. The sidewalk is uniform in width on the west side of Twenty-second Street and is five feet in width. The ramp on the west side of Twenty-second Street and extending up into the filling station lot is 45.3 feet long. From the north end of the ramp to the south line of East Eldorado Street is nineteen feet seven inches.

The street car was operated by O. B. Wyatt, for the Illinois Power and Light Corporation, and operates on a track in the middle of Twenty-second Street. It was stopped at the time in question at the south line of Eldorado and Twenty-second Streets. It was a one end car, operated by one man. The doors are operated by air. When the doors are closed the steps fold up inside and against the regular stop of the door. There is only one step. The operator was in the north end of the street car or vestibule. The door on the east side at the north end was open, the door at the south end and on the west side was closed. The step at that door was folded up. There were no other steps at the south end of the street car. As the street car proceeded north the operator was standing at the north end of the car at the control. He stopped at the south sidewalk line on Eldorado Street. He opened the door on the east side at the north end, and a little girl, a lady and one man got on the car at that time. The south door was not opened nor was anything changed. The street car was

twenty-seven feet long.

The defendant in error, plaintiff below, resides in the State of Mississippi, but temporarily resided on North Twenty-fifth Street in Decatur, a period of three days prior to the day of the accident. At the time of the trial she lived in Deland, Illinois, and prior to moving to Decatur, lived in Cisco, Illinois. Twenty-fifth Street is three blocks east of the place of collision. On the day in question, July 19, 1931, the defendant in error, plaintiff below, accompanied by R. Hans, her husband, Mr. Ignatz Bley, her brother, Mrs. Mary Bley, her sister-in-law, and a niece about six years of age, went to the intersection of Eldorado and North Twenty-second Streets from this home.

Upon reaching the intersection they crossed Twenty-second Street to the west side thereof and waited under a porch or shelter in front of the Little Gem restaurant until the arrival of the street car. It was raining. They reached the intersection about 9:45 o'clock a. m. and remained in front of the restaurant about ten minutes. This place is about seventy-five or eighty feet south of Eldorado Street. The street car came from the south and continued northwardly until it reached a point near the south line of Eldorado Street where it came to a stop. Mrs. Lena Hans and all her party then proceeded in a northeasterly direction across the boulevard into Twenty-second Street to the rear or south end of the street car, thence eastwardly along the rear end of the car to a point just east of the car tracks and thence north along the east side of the street car. At a point about midway of the street car all of the party continued to the open door at the north end of the street car, except the defendant in error, who noticed she had dropped or misplaced her handkerchief and started back after it. She turned about, walked to the south or rear of the street car, turned to her right or to the west and

started in the general direction from which she had come. She testified she was five feet from the street car, crossed the east rail of tracks, took a few steps and does not remember what then occurred; that she never got beyond the west rail, although she did not see it; also that she looked north but the street car was there so she did not see the automobile of plaintiff in error at any time. She further testified that she was struck inside of the west rail, but that she did not see the automobile and did not know what struck her.

There was a judgment in favor of defendant in error in the sum of five hundred dollars and plaintiff in error has brought the record to this court, by appeal, for review.

Numerous legal questions are raised upon this record in the admission and rejection of testimony and the giving and refusal of instructions. Plaintiff in error strenuously contends that the court erred in not instructing the jury to find a verdict for plaintiff in error at the close of plaintiff's case and again at the close of all the evidence, proper motions and forms of instructions having been submitted covering each count in the declaration.

Plaintiff in error contends that there were no proofs offered tending to sustain the first four counts in the declaration, and that as to the negligence counts there were no proofs offered as to the due care on the part of the defendant in error.

It becomes necessary to carefully examine the testimony in this case.

The testimony of defendant in error is summarized in the following questions and answers:

"Q. Now, Mrs. Hans, just describe what happened there, with reference to whether you remember anything more.

"A. No.

"Q. Or whether you didn't?

"A. No, I was just knocked out. I didn't know what became of me."

* * * *

"Q. You didn't look to the north?

"A. No, sir, I looked, but the street car was there.

* * * *

"Q. You didn't see the west rail?

"A. No, sir, I stepped on the east rail and took a few steps and I was gone. I had no time to see the west rail.

* * * *

"Q. You didn't see the car that hit you?

"A. No, sir.

"Q. At no time, upon that occasion, did you see the automobile that hit you?

"A. Not the one that hit me.

"Q. Do you know, Mrs. Hans, that an automobile did hit you?

"A. No, I don't know what hit me. I don't know, I didn't see what hit me."

Arthur Witt did not see the accident but states that after the accident and when plaintiff in error's car came to a stop, it was at least four car lengths south of the street car. He did not measure it but estimated the distance. He saw defendant in error under the car fender.

Mrs. Mary Bley, sister-in-law of defendant in error, testified as follows: We all started north and across Twenty-second Street and went around on to the south end of the street car to the front end, and to the east entrance on the north side. Mrs. Hans was the last one. After reaching the north end of the street car I got on first, then my husband and then Mr. Hans.

I stopped there by the seat and my husband was paying the fare. I was facing south and was between the seats in the center of the street car. I saw a car was running, and her head was under the car, under the fender and was bumping up and down. The automobile was moving south. I just seen it before it stopped, around five or six feet. I started out of the street car and ran down to the automobile. The wheel of the automobile was by the west rail. The wheel was east of the west rail; the automobile was headed south. Mr. Riedlinger was sitting in the front seat. Mrs. Hans was under the automobile, the left fender, and she was unconscious.

Again on cross-examination Mrs. Bley testified: I was facing south and stopped by the first seat. At that time Mr. Hans just stepped up on the step of the car. I didn't see Mrs. Hans, and the next time I saw her was under the automobile some distance south of the street car. The automobile was south of the street car and in the middle of Twenty-second Street. I don't know how far south of the street car it was, and have no judgment about it. Two of the automobile wheels were on the street car tracks; I mean the two left wheels. They were about two or three inches east of the west rail. I did not see the front wheel of the automobile as I stood there in the car. I don't know where the automobile was as it passed the street car. When I saw the automobile south of the street car, the left wheels were east of the west rail.

Her husband, Ignatz Bley, brother of defendant in error, testified: After reaching the north end of the street car I was the first one on and stopped to pay the motorman. My wife came after me and Mr. Hans and my little girl after him.

"Q. Not what he said; did you hear any exclamation or any sounds or anything there at that time?

"A. I heard a kind of a soft bump."

I ran out of the street car and ran about fifty to sixty feet from the south end of the street car to the automobile where my sister was laying. This automobile was headed south. The defendant, Mr. Riedlinger, was in the car and was seated behind the steering wheel, and a little girl was beside him. I noticed my sister under the machine. She was lying behind the left front wheel underneath the fender. The automobile was fifty-three or fifty-four feet south of the south end of the street car. A crowd came over, raised the car up and I dragged my sister from under it. Her head was about one foot east of the west rail, was bleeding and her hair was full of blood, and there was blood on the pavement. This blood was right underneath where my sister's head lay. I took my sister into a grocery store on the west side of Twenty-second Street.

Bley also testified that the street car extended one foot and eight inches outside of the rail. He took some measurements to a pole and by that estimated the distances.

Rudolph Hans, a son of defendant in error, testified that in the afternoon of the day of the injury he saw a spot of blood about one hundred twelve feet south of where the street car had stood.

R. Hans, husband of defendant in error, testified: It was raining that morning. We remained in that vicinity for about ten minutes. We waited on the west side and south of the corner of Eldorado and Twenty-second Street. It was raining that morning and we went under a little shelter south of Eldorado Street about seventy-five feet. The street car came from the south and stopped, the northeast door of the same being about two feet past the sidewalk line running east and west in Eldorado Street. There was a

door on the southwest side of the street car. I don't think it was over two and one-half feet from the end of the car.

After the street car stopped there it quit raining a little bit and I went across Twenty-second Street and stopped under the shelter. Before that time I had not walked around either end of the street car because there was no street car there when I got there. After the street car arrived I walked east around in front of the west side. The car was headed north and south and the south end was the front end. I passed around the front end and went to the back door on the east side and the east door was back practically two feet past the sidewalk line on Eldorado.

"Q. What did you do when you came to the door?

"A. I was on the step and I heard an awful racket.

"Q. Then what did you do?

"A. Well, I looked around, and as soon as I heard the racket I looked around and didn't see my wife."

I jumped off the car and ran down to see where she was. I ran south. When I came to the south end of the street car I saw an automobile standing there straddling the west rail, and that's where I found my wife. The automobile was standing still and headed south. It was a four-passenger automobile. I am not sure whether it was a closed or open car. I saw a man sitting behind the wheel. I never saw him before and did not know who he was. I think it was Mr. Reidlinger there—I don't know him.

"Q. Now when you came there to the car, I will ask you to state whether anything was said by Mr. Reidlinger at that moment when you came up there, and if so, I will ask you to state what was said.

"A. I said, 'What do you want to drive so fast?' "

And he said he had not seen her.

Mrs. Hans' clothing was caught under the running board on the corner, I mean on the running board over the wheel on the part of the running board that was the wheel on the west track and the left wheel of the automobile. The automobile was fifty some feet south of the south end of the street car. I picked up her shoes, picked up her feet and picked her up as much as I could carry her myself, and somebody else with me, and we carried her into the store on the west side of the street.

Hans further testified: The clothing over her right shoulder was fastened on this car. It was caught on the front of the running board only on the edge of it and where it connects with the fender. My wife's limbs were to the west and north and her head to the east and south and her face to the north. As to what my wife did when she turned and left the east side of the street car, I don't know; I didn't see it. As to where the automobile came from I don't know; I didn't see that. I didn't see the automobile. I am the husband of Mrs. Hans, the plaintiff, and was her husband on July 19th.

O. B. Wyatt, operator of the street car, fully described the car, except as to length. The door at the south end, on the west side of the car, had not been opened but was closed.

Specifically, defendant in error in describing the injury, testified as follows: I reached the intersection on this Sunday morning about ten or fifteen minutes to ten, and with me was my husband, Mr. Bley and Mrs. Bley, and a little girl about six years old. Mr. Bley is my brother. It was cloudy and sprinkling just a very little. After we got there the street car wasn't there, so we waited until the street car came. We waited about ten minutes. The street car came from the south on Twenty-second Street and stopped at the end of Twenty-second Street. By the end of

Twenty-second Street I mean that the street car doesn't go any further north; it goes back south. It stopped about sixteen feet south of Eldorado Street. While waiting for the street car, we were on the west side of Twenty-second Street, and after the car stopped, the crowd I was with started across to the east and then walked to the north to the back door and I followed them to the back door, and by that I mean the back east door of the street car. I first walked east and then I walked along half the length of the car to the north. When I got half way of the length of the car I noticed I had lost my handkerchief.

"Then what did you do?

"A. Then I decided I would go back and find my handkerchief."

(Motion by defendant to strike answer. Motion allowed. Exception by plaintiff.)

When I got half way the distance of the car I turned around and walked south from the street car five feet. I walked south then started across the tracks to the west. I was five feet south of the street car.

"Q. Go ahead and tell what you did then, and what happened.

"A. Well, I took a few steps, I stepped on the east rail and took a few steps, and no more.

"Q. What happened then?

"A. I was killed—I don't know no more.

(Motion by defendant to exclude answer. Motion allowed. Exception by plaintiff.)

"Now Mrs. Hans, just describe what happened there, with reference to whether you remember anything more.

"A. No.

"Q. Or whether you didn't.

"A. No, I was just knocked out. I didn't know what became of me.

(Motion by defendant to exclude answer. Motion allowed. Exception by plaintiff.)

THE COURT: She may tell what she remembers up to the point she ceases to remember, if there was such a time.

"A. I didn't remember anything after that until about three o'clock that afternoon.

"Q. As you went on this occasion, as you turned and walked to the west and crossed the east rail of the street car track, to the south of the south end of the street car, just describe the condition of the traffic there, in North Twenty-second Street, to the south of you.

"A. Going to the south?

"Q. Yes.

"A. Yes, sir, I seen traffic. It didn't look dangerous to me because it was too far away."

(Motion to exclude; allowed; exception.)

The traffic was not coming towards me, I didn't see any traffic at that moment, except the street car. At that time I was standing on the west side of the street car.

As I turned and came across on the south end of the street car, I noticed a car to my right, close, coming toward the street car. I didn't see any traffic officer at that place that morning. As I regained consciousness I was at the St. Mary's Hospital.

This was all of the testimony offered by defendant in error upon the direct. Plaintiff in error, by proper motions, instructions and forms of verdicts, moved the court to instruct the jury to find a verdict for plaintiff in error upon each count in the declaration, which the court refused to do and proper exceptions were taken.

On the part of plaintiff in error it was stipulated that there was in effect in the city of Decatur on July 19th, 1931, an

ordinance No. 997, and that section forty-six of said ordinance provides as follows: Pedestrians crossing the streets at other places: Pedestrians crossing streets not in cross walks as defined herein, shall yield the right of way to vehicles.

Plaintiff in error's testimony as to how the accident happened was as follows: I am the defendant in this case and reside at 1329 Riverside Avenue, Decatur, Illinois. I am a millwright employed by A. E. Staley Manufacturing Company and have lived in Decatur for twenty-six years and have worked at Staley's for ten years. I remember the occasion of an accident on July 19th last. I was the possessor of a 1929 Oldsmobile five-passenger sedan which I was driving on Twenty-second Street on the date in question. That was about ten o'clock in the morning on a Sunday. With me were my two grandchildren. Their names are John and Virginia Reidlinger. John is two years old and Virginia is five years old. Virginia was up at the windshield holding on to it and the boy was sitting in the seat beside me. I had come over the Staley Viaduct which is directly north of the intersection of East Eldorado and North Twenty-second Streets. I remember approaching the intersection on that date.

I was driving on the west side of the street. I have driven an automobile about fifteen years and from my experience in driving cars and my observation of cars I am able to fix the speed of a moving vehicle. I have an opinion as to the speed of my car as I entered the intersection of Eldorado and North Twenty-second Streets on the day in question, and that is fifteen miles per hour. After entering the intersection I continued on straight south and as I neared the south side of the intersection my speed was ten miles per hour. As I crossed the intersection I observed to the south of me a street car standing in the middle of Twenty-

second and Eldorado Streets and I also observed some people at the southeast corner of the intersection, and I further observed a man in charge of the street car standing at the change box in the north end of the street car. The north end of the street car was about six feet south of the sidewalk line on the south side of Eldorado Street. I did not know Mr. and Mrs. Bley, Mr. Rudolph Hans nor Mrs. Lena Hans, the plaintiff. I saw some folks on the ground at the northeast corner of the street car. I can't say whether the door on that corner of the car was open or closed. From there I proceeded directly south.

After reaching the south side of Eldorado Street I observed south of me and on the west side of Twenty-second Street an automobile coming out of a filling station. At that time I did not know who was driving it but later learned it was Bartley Wilson. He was pretty close to the sidewalk line. When I first noticed him the car was moving. Later he stopped his automobile. As I was driving near the north end of the street car my automobile was about three feet from the street car. At that time the speed of my car was ten miles per hour. I continued on south and reached the south end of the street car and the speed of my automobile was still ten miles per hour. I was at that time also about three feet from the street car and possibly two feet east of the west curb line of Twenty-second Street. The brakes on my automobile were in good shape upon that occasion.

"Q. What happened next, Mr. Reidlinger?

"A. I came in contact with a lady coming across the front end of the car.

"Q. Front end of what car?

"A. The street car, at the south end.

"Q. Where was she when you first observed her?

"A. Right in front of me.

"Q. In which direction was she moving?

"A. South and west.

"Q. I will ask you if you observed her face or head and as to which direction her head was facing?

"A. She was facing southwest.

"Q. When you saw her what did you do if anything?

"A. I applied my brakes.

"Q. What part of your car did she come in contact with?

"A. The front end.

"Q. Did your car stop?

"A. Yes, sir.

"Q. Where?

"A. South of there.

"Q. About how far?

"A. Fifteen feet.

"Q. What did you do then?

"A. I got out of the car."

At no time did I drive my car or any part of it to the east of the west rail of the street car track; that didn't happen. I did not turn my car to the left in behind and to the south of the street car. The lady was about two feet from the south end of the street car. When I got out of the car after stopping I saw the lady behind the left front wheel of my car under the car. At that time my automobile was two feet west of the west rail of the street car track. She was lying under the fender right back of the wheel with her head extended out into the street car tracks. The rest of her body was under the car pointing west. I was east of the Gem Restaurant and south of the filling station.

I raised the car up and took the lady out from under it. She was taken into Causey's store. An ambulance came and took her away. I did not have any conversation that day with Mr. Hans.

I heard no one say to me: "Why are you driving so fast?" or words in substance meaning that. I did not say to anyone: "I didn't see her" or words to that effect.

CROSS-EXAMINATION

I did see her on that occasion before she was struck, immediately before she was struck. I saw the street car taking on passengers and drove within three feet of the right hand door on that occasion. I was going ten miles an hour and stopped within fifteen feet. I put on my foot brakes. They were in good shape. The little child standing on the seat beside me tumbled down on the seat when the brakes were applied. I could not see how far my car slid; I don't know. I was down in front of the Little Gem Restaurant when the car stopped. The lady was struck between a line between the right front of Wilson's car and about two feet south of the street car. Mr. Wilson was coming out of one of the driveways of the filling station at the time. I did not hear his horn. My windows were open on the left hand side but not on the right hand side on account of the children. My hearing is normal. I didn't sound my horn on that occasion. When I passed the Wilson car I was about three feet from it. His car came to a stop when my automobile was at the north end of the street car. My foot was not upon the accelerator at that time. I was using the gas control on the wheel, had it set. When I put on the brake I disengaged the motor also, that is, I threw out the clutch. I did not see any other cars in front of me on that occasion. I have traveled over that intersection for the last twenty-five years. I knew upon that occasion that the street car was accustomed to taking on and receiving passengers and discharging passengers on the south side of that intersection and I could see that at the time in question it was in the act of receiving and discharging passengers on the east side.

In this testimony plaintiff in error was corroborated by

Samuel A. Orr and F. B. Wilson, who were both in the Wilson car driving out of the gasoline station to the east, directly west of the street car. Orville Mullis also testified for plaintiff in error and corroborated his testimony. Mullis was sitting in a car on the east side of Twenty-second Street. E. C. Causey, who operated a grocery store on the west side of Twenty-second Street, at the alley, testified for plaintiff in error as follows:

"Q. What did you see?

"A. There was a lady came around the rear of the car and walked in front of an automobile.

(Motion by plaintiff to strike as being a conclusion. Overruled. Exception by plaintiff.)

There was a street car there, south of the Eldorado Street intersection.

"Q. The lady you saw was walking in what direction?

"A. She was gong west to the west side of the street."

(Motion to strike answer for the reason that witness said "toward the west side of the street;" allowed. Exception by defendant.)

The lady came around the rear of the street car and was headed west. She was walking along. From where I was I observed that she was looking west. An automobile came around from the street car. I don't know where he came from.

I later learned that it was Mr. Reidlinger's automobile. I own and have driven an automobile for about ten years and am able from my experience and observation to fix in a general way the rate of speed of a moving car. In my opinion the defendant's car was going at about five miles per hour.

"Q. I will ask you where the lady was when she stopped in front of the automobile with reference to the street car tracks?"

(Objected to for the reason the question assumed she stepped in front of the automobile. Sustained. Exception by defendant.)

When the lady and the automobile came together she was about two feet west of the street car tracks. I didn't leave the store. Someone came into the store and I had to leave. I didn't see him come to a stop.

Again, at the close of all of the testimony, plaintiff in error moved for an instructed verdict upon each count in the declaration, which the court denied and proper exceptions were taken. These rulings are basic error assigned by plaintiff in error.

It is contended by defendant in error that plaintiff in error, having proceeded to put in proofs after the court had denied plaintiff in error's motion at the end of plaintiff's case, plaintiff in error had waived his right to rely upon error for the denial of his motions to instruct, citing **Funkhouser** v. **Illinois Bankers** Life Ass'n., 237 Ill. App. 101. In the Funkhouser case the court held: "When the motion was renewed at the close of all the evidence the question then before the trial court was and now before this court is, on the whole record, does all the evidence for both parties sustain appellee's case? **(Knights Templars & Masons Life Indemnity Co.** v. **Crayton, supra; Britton** v. **St. Louis Transfer Co.**, 115 Ill. App. 317, and **Grollman** v. **Montgomery Ward** & Co., 181 Ill. App. 598.) As above stated, when all the evidence is considered we cannot hold that the verdict is manifestly contrary to the evidence on this point. Therefore it was not error for the trial court to deny appellants's motion for a peremptory instruction at the close of all the evidence."

Plaintiff in error relies upon **Miller** v. **McHale**, 263 Ill. App. 471, where it is held:

"The sole ground for the reversal of the judgment, as urged by defendant's counsel, is that the court erred in not granting defendant's motions, made at the close of plaintiff's evidence and again at the close of all the evidence, for a directed verdict in his favor. After carefully reviewing the evidence, and considering recent decisions of the Supreme Court of this State, we feel constrained to hold, and do hold, that said motions should have been granted." * * *

"Equally without merit, in our opinion, is plaintiff's counsel's further contention that because, after said motions for a directed verdict had been denied, defendant by his attorney argued to the jury the question of the negligence of the driver of the car only, and thereafter requested the court to give certain offered instructions on the issue of his negligence only, defendant took an inconsistent position and waived his right to here assign error on the denial of said motions. In **Nosal** v. **International Harvester Co.**, 187 Ill. App. 411, 412, it is decided that after an adverse ruling on a motion for a peremptory instruction, a defendant may proceed with his defense on the theory of the law adopted by the court without waiving his right to have said ruling of the court review on appeal. There are numerous other decisions to the same effect by our courts of review. (**West Chicago Street R. Co.** v. **Liderman**, 187 Ill. 463, 468; **Chicago Union Traction Co. v. O'Donnell**, 211 Ill. 349, 350-1; **Illinois Cent. R. Co. v. Swift**, 213 Ill. 307, 313; **Cutler** v. **Gardiner Metal Co.**, 225 Ill. App. 497, 500-1.) In the cited **Swift** case, decided before the amendment to section 81 of the Practice Act was made in 1911, our Supreme Court said (p. 313): 'The motion for a peremptory instruction presents a pure question of law, and, in the event of an adverse ruling, an exception preserves that question of law for the consideration of an

appellate tribunal. After that adverse decision the defendant may argue to the jury that its guilt is not shown by a preponderance of the evidence, which is purely a question of fact, and the submission of that question of fact to the jury by instructions offered by the defendant does not waive the question of law already passed upon by the court where the defendant's rights have been properly preserved. This has been the universal practice in this State for many years and will not now be disturbed.' ''

As to the first, second and third counts in the declaration the intention to do harm is of the essence of an assault. (**Johnson** v. **Englehardt**, 256 Ill. App. 557; **Paxton** v. **Boyer**, 67 Ill. 132; 2 Greenleaf on Evidence, sec. 83; **Kennedy et al.** v. **People**, 122 Ill. 649; **Razor** v. **Kinsey**, 55 Ill. App. 605; **Gilmore** v. **Fuller**, 198 Ill. 143; **Nichols** v. **Colwell**, 113 Ill. App. 219; **Shanley** v. **Wells**, 71 Ill. 78.)

There is no testimony in this case that justifies a charge of assault.

The fourth count charges that the injuries were willfully and wantonly inflicted by plaintiff in error. It has been held that

'' 'In order that one may be held guilty of wilful or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result. In order to establish wantonness it is not necessary to show an entire want of care. The violation of a statute does not constitute a wilful wrong. A wilful injury will not be inferred when the result may be reasonably attributed to negligence or inattention.' 29 Cyc. 510.''

Lamarre v. **C., C., C. & St. Louis Ry. Co.**, 217 Ill. App. 305. (**Grinestaff** v. **New York Cent. R. R. Co.**, 253 Ill. App. 596; **Powell** v. **Kempton**, 231 Ill. App. 384; **Browne** v. **Siegel, Cooper & Co.**, 191 Ill. 226; **Streeter** v. **Humrichouse**, 261 Ill. App. 564; **Nosko** v. **O'Donnell**, 260 Ill. App. 544; **Illinois Central R. R. Co.** v. **Eicher**, 202 Ill. 563.) There was no testimony submitted in this case tending to show that plaintiff in error was guilty under the fourth count in the declaration.

The remainder of the counts are based upon negligence. An act based upon negligence and one based upon willfulness are independent and diverse causes of action, fundamentally different, and proceed from different principles. (**I. C. R. R. Co.** v. **Eicher**, 202 Ill. 556; **Grinestaff** v. **New York Cent. R. R. Co., supra**; **Robbins** v. **Illinois Power & Light Corp.**, 255 Ill. App. 124; **Burns** v. **C. & A. R. Co.**, 229 Ill. App. 170; **Streeter** v. **Humrichouse**, 261 Ill. App. 556.) And it has been held that where the declaration contains some counts charging general negligence and others charging willful and wanton conduct and the evidence being insufficient to sustain the latter, a judgment upon a general verdict must be reversed as the injury cannot be caused willfully and negligently at the same time. (**Streeter** v. **Humrichouse, supra**; **Grinestaff** v. **N. Y. Cent. R. R.**, 253 Ill. App. 589; **Walldren Express Co.** v. **Krug**, 291 Ill. 472; **Stoike** v. **Bonasera**, 243 Ill. App. 281; **Burns** v. **Chicago & Alton Railroad Co.**, 229 Ill. App. 186.)

Under the ordinance of the city of Decatur defendant in error, when injured, was in a place and situation where she had no right to be and was there at her own peril, as plaintiff in error had the right of way.

According to Causey's testimony, defendant in error, when struck was about two feet west of the west rail of the street car tracks, and according to the proofs defendant in error was

about four inches west of the west line of the street car. The west side of the street car was the south line drive for machines going south on Twenty-second Street. There are no proofs in the record that defendant in error at any time looked to the north, on the west side of the street car, for an approaching car, as it became her duty to do. Proof of due care must be affirmatively shown by the evidence. (**Dee** v. **City of Peru,** 343 Ill. 41; **Butler** v. **Illinois Traction Inc.,** 253 Ill. App. 143; **Illinois Central R. R. Co.** v. **Oswald,** 338 Ill. 270; **Engstrom v. Olson,** 248 Ill. App. 480; **Calumet Iron & Steel Co.** v. **Martin,** 115 Ill. 368; **Werk** v. **Illinois Steel Co.,** 154 Ill. 432; **Urban** v. **Pere Marquette R. Co.,** 266 Ill. App. 152.) Counsel for defendant in error cite **Mulligan** v. **Andel,** 245 Ill. App., 132, as a similar case on the facts, but we have examined that case and the facts in that case are not the same as the facts in this case. Even if it is shown that plaintiff in error may have been guilty of negligence in the case at bar, it is equally established by cogent proof that defendant in error was guilty of contributory negligence which contributed to the proximate cause of her injury. Accordingly, the judgment of the Circuit Court of Macon County is reversed with a finding of fact.

Reversed.

The clerk will incorporate as a part of the judgment in this case the following finding of fact:

We find as facts in this case that the plaintiff in error did not assault the defendant in error, as set forth in the first, second and third counts in the declaration, and that the plaintiff in error did not willfully and wantonly injure the defendant in error, as set forth in the fourth count in the declaration, and we further find as a fact that defendant in error was guilty of contributory negligence which contributed to the proximate cause of her injury.

General No. 8670 Agenda No. 14

OCTOBER TERM, 1932

Security Life Insurance Company of America, a Corporation, Appellant,

vs.

Katie Fuchs, Appellee.

Appeal from the Circuit Court of Shelby County.

SHUTTLEFF, J.

This is an appeal brought by the Security Life Insurance Company of America from a decree of the Circuit Court of Shelby County, denying the prayer for an injunction against the collection at law of a certain insurance policy.

On September 30, 1930, the Security Life Insurance Company of America, a corporation, issued its policy to Goldie Fuchs, an unmarried girl, upon her written application in two parts, dated September 22, 1930, and September 26, 1930, with a later amendment on November 5, 1930.

Applicant died on February 27, 1931, following normal birth to her of a normal child on February 21, 1931, being four months, twenty-six days after date of application. Katie Fuchs was named as beneficiary in said policy.

No suit being filed against the Company within one year from date of policy, the company, on the last day within such year, filed its bill in equity to cancel said policy for fraud. A common law suit thereafter being filed, a supplemental and amended bill was filed by complainant, issue was joined, praying that said suit be enjoined, and cause was heard by the chancellor, who denied the prayer to cancel said policy and appellant prosecutes this appeal.

The bill, after alleging due incorporation of appellant in Virginia and its being duly licensed from July 1, 1930, to July 1, 1931, to transact business in Illinois, alleged that on September 22, 1930, Goldie Fuchs made written application for life insurance policy of one thousand dollars, designatuing her mother, Katie Fuchs, as beneficiary therein; that in said application said Goldie Fuchs answered certain questions as follows:

"Q. Is menstruation normal?

"A. Yes.

"Q. Date of last?

"A. August 25, 1930.

"Q. Are you now pregnant?

"A. No."

Appellant alleged that said application was by its terms a part of said policy and that the policy was not to be in effect unless delivered to said Goldie Fuchs when the latter was in good health.

It was further averred in the bill that the company relied upon the statements so made in such application and issued its policy, No. 125,002, to her, in reliance upon her said statements, and that said Goldie Fuchs intended the company to rely on same; that the statements were false; that Goldie Fuchs had not had her last menstruation on August 25, 1930; that her menstruation was not normal, and that she was and had been pregnant for some months prior to the date of her said statement of facts. Further, that said Goldie Fuchs knew said statements to be then false and untrue, knew what her condition was and that she made said statements and concealed her said condition for the purpose of inducing the company to issue said policy; that the company was thereby induced to and did issue said policy, which it would not have

done had the truth of said matters been made known to it. Further, that the said matters were and are material to the risk assumed, and that the policy is and was therefore void by reason of fraud and mistake; that said Goldie Fuchs died February 27, 1931, five months after making said statements as a result of infection following the birth of a child; that by its terms said policy would be incontestable on the ground of matters alleged after one year from its date; that it is the purpose of appellant to bring no action until such year has passed, thereby seeking to deprive the company of its defense to said policy; further, praying that appellant be enjoined from filing suit to collect on said policy.

After the bill herein was filed and more than one year after the date of the policy, a common law action was filed by Katie Fuchs, the beneficiary in said policy, against said company, and thereafter an amended and supplemental bill was filed by appellant to enjoin the prosecution of said common law suit, said policy of insurance being therein set forth in haec verba.

A demurrer to the original bill was overruled. A motion to strike the supplemental bill was denied. Appellee filed her answer to said original and supplemental bill as amended, wherein she admitted appellant is engaged in a general life insurance business with its principal office in Chicago; that the application in said policy contains the questions and answers alleged, and that said application is a part of said policy and admits the death of Goldie Fuchs; admits tender of refund of premium; admits that said policy is substantially set forth in appellant's bill. Appellee denies appellant's capacity to institute its said suit; denies that the statements contained in said policy were false, and denies that Goldie Fuchs knew them to be false or knew what her physical condition was; denies Goldie Fuchs made statements

and concealed her true condition for the purpose of inducing the company to issue said policy, and avers that the statements so made by Goldie Fuchs were true to the best of her knowledge, information and belief. Appellee further avers that said Goldie Fuchs was then in good health and that said statements were representations and not warranties.

Replication was filed and a stipulation entered of record, whereby it was agreed that the decree in this cause should be determinative of the judgment to be entered in the common law action. Hearing was thereupon had in open court, before the chancellor, and a decree rendered denying the prayer to cancel said policy and to enjoin collection at law on said policy. From this decree appellant prosecutes its appeal.

On page two of the policy it is provided: "INCONTESTABILITY. 1. THIS POLICY SHALL BE INCONTESTABLE AFTER ONE YEAR FROM ITS DATE, except for non-payment of premiums and for violation of the conditions of this policy relating to the military or naval service in time of war as provided in the disability and double indemnity clauses, if any. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall void this policy unless it is contained in the written application therefor and a copy of such application shall be attached to the policy when issued."

It has been held that the language of an application to make the statements therein warranties must be so clearly and unequivocally expressed as to leave the court no other alternative but to construe the statements to be warranties. (**Briggs** v. **Bankers Accident Insurance Co.**, 214 Ill. App. 186; **Minn. Mut. Life Ins. Co.** v. **Link**, 230 **Ill. 276.**)

It has also been held that the fact that assured was pregnant

when she answered in the application that she was not, would not make her answer fraudulent unless she knew of her condition, and where a witness for the insurer testified that assured might have been pregnant and not have known it, it cannot be held that her answer was fraudulent. **Rataj** v. **Providers Life Assurance Co.**, 221 Ill. App. 466.

The issue in this case is an issue of fact whether Goldie Fuchs answered the questions in the application falsely, knowing such answers to be false. There is no question but that Goldie Fuchs was pregnant when she signed the application, but the question is, did she know she was pregnant and knowingly answer the questions falsely.

On September 25, 1930, Goldie Fuchs made application to appellant for a policy of life insurance in the sum of one thousand dollars containing the following questions and answers:

"Q. Is menstruation normal?

"A. Yes.

"Q. Date of last?

"A. August 25, 1930.

"Q. Are you now pregnant? (If so, how far advanced?)

"A. No."

Followed by the statement, "To the best of my knowledge and belief I am in good health. It is hereby agreed: That the foregoing statements and answers are full, complete and true and shall in the absence of fraud be deemed representations and not warranties and are offered to the company as a consideration of the contract," etc.

Appellant, neither in its original bill nor its supplemental bill, alleges that these answers or statements are warranties, and it was not contended on the trial of the case in the Circuit court that they were warranties, but on the other hand it was

conceded by appellant that they were representations.

On the allegation in appellant's bill that the insured was not in good health at the time of the payment of the first premium and the delivery of the policy in question to her, appellant offered no testimony except that which established the fact that she was then pregnant. The uncontradicted evidence of Dr. W. G. Turney and Dr. Theodore Thompson was to the effect that normal pregnancy is a physiological condition as distinguished from a pathological condition and that a woman normally pregnant is in good health. Dr. W. G. Turney, medical examiner for appellant, testified that the insured appeared in every way normal at the time he made the medical examination and Dr. J. M. Little testified that her pregnancy was normal at the time he observed her and that she gave birth to a normal child.

The bill alleges that the answer "yes" to the question, "Is menstruation normal?" is false; that the menstruation of the insured was not normal and that said answer was made by the insured knowing that the same was false; that the answer, "August 25, 1930," to the question, "Date of last menstruation," was false; that the insured knew of its falsity at the time of making said answer; that the answer "no" to the question, "Are you now pregnant? (If so, how far advanced)" was false; that the insured knew said answer was false at the time of making the same.

In order to sustain its contention that the answers to the questions above set forth were knowingly false when made by the applicant, appellant offered the evidence of Dr. C. H. Gulick, a graduate of an eclectic school, who testified in effect that some time during the month of January, 1931, Goldie Fuchs, the insured, with her aunt, Carrie Robison, called on him professionally and in a conversation in which Carrie Robison did most of the talking, it was said in substance by the said Carrie Robison, in

the presence of the said Goldie Fuchs, that the said Goldie Fuchs was pregnant and had not menstruated since the preceding May. This conversation was specifically denied by Carrie Robison.

Dr. J. M. Little, a witness for appellant, testified that Goldie Fuchs and Carrie Robison called at his so-called maternity home in Pana, Illinois, in November of 1930; that Carrie Robison said, in substance, that Goldie Fuchs had not menstruated since the preceding May and that from said statement of Carrie Robison, together with a physical examination which he made and the statement of Goldie Fuchs that she had for a short time previous thereto felt movement, determined that she would be confined on or about February 7, 1931. Carrie Robison specifically denied making any statement to Dr. Little to the effect that the insured had not menstruated since the preceding May and further denied that any such conversation took place. Dr. Little was unable to fix the time of the conversation other than it was some time in November; he had kept no record of it and stated that he was testifying purely from memory.

On behalf of the appellee the statements made by the applicant in said application were in evidence and eight responsible business men, who had known the insured for many years prior to her death, testified that she bore a good reputation for truth and veracity among her neighbors and associates in the community where she resided. In addition to this her aunt, Carrie Robison, testified that the insured had lived in her home throughout the year of 1930 and that she did not know anything concerning the pregnancy of the insured until during the latter part of November when the insured told her that she had just found out that she was pregnant. Carrie Robison further testified that up until November of 1930 Goldie Fuchs was a girl of happy and care-free disposition, but that during the month of November she became

melancholy and morose and frequently indulged in fits of crying, and upon the insistence of the said Carrie Robison, she finally told her about having discovered that she was pregnant.

Edna Yoder, a sister of the insured, testified that she worked at the same machine with her in the Ely-Walker Garment factory in the summer and fall of 1930; that at the time of the menstrual periods of the said Goldie Fuchs she suffered with cramps and was on some occasions indisposed to the extent that she was not able to work the entire day. Edna Yoder further testified that shortly prior to the 29th of September, 1930, the time being fixed by the witness from memory as some time earlier in September, the menstrual period of the insured came on while they were working together at the garment factory and that she loaned to the insured a nickel which was inserted in a vending machine for the purchase of a sanitary napkin to properly care for her condition. Edna Yoder further testified that the insured was happy and jovial and care free up to the late fall of 1930, at which time she became melancholy and sad.

Fred Brack, the employer of the insured, Emma Dilley, a co-worker with the insured, and Ross Robinson, an uncle of the insured, all testified that the insured was happy and jovial and care free until some time in November of 1930, when she suddenly became sad and melancholy and finally avoided associating with other people.

Doctors Turney, Hulick and Thompson all testified in substance that it was not uncommon for women to continue to menstruate after pregnancy and that in some cases they would menstruate throughout the entire period of gestation; that the period of time elapsing from conception to the discernment by the expectant mother of movement varied from a few weeks to five and one-half months, and that pregnancy was not necessarily apparent to the mother

until movement is felt and in many cases could not be diagnosed by a physician until four and one-half or five months had elapsed from the time of conception.

There is no provision in either the policy or the application making any statement of the applicant a warranty. The words "statement," "agreed" and "contract" are frequently used in the policy and application, and by the express provisions of both all statements made by the applicant shall, in the absence of fraud, be deemed representations and not warranties.

On February 7, 1931, Goldie Fuchs entered the maternity hospital of Dr. Little and on February 21, 1931, gave birth to a child, who within a few days sickened and died. On February 27, 1931, the insured died from the effects of peritonitis.

Dr. J. M. Little testified that he had not made the statement to Carrie Robison, Oka Robison and Ross Robison that if he could have had the insured for treatment some time sooner he could have relieved her of her pregnancy without any trouble, and that a number of girls, some of them high school girls, had come down from Taylorville and that he had relieved them of their pregnancy. Each of these witnesses testified that Dr. Little had made this statement or the substance of it to them when they were at his maternity home.

It is held that a woman in normal pregnancy is in a condition of good health. (Knights & Ladies of Security v. Glenn (Fla.) 80 So. 516; 2 A. L. R. 1503.) The court holds in the last case: " 'A physiological condition with reference to a human being is a normal condition. A pathological condition is a diseased condition. It is not possible for a physiological and a pathological condition to exist at one and the same time with reference to the same subject-matter in one person. The condition of a woman who is pregnant, in a state of normal pregnancy, is physiological. A person who is in a physiological condition of

health is in good health. . . . If a woman was pregnant, and examination was made of the urine, and that examination disclosed no albumen and no casts, I would say she was in a normal condition.' ''

We have read all of the testimony and we cannot say that the proofs do not support the decree dismissing the original bill and the supplemental bill of complaint. The chancellor saw and heard the witnesses. The facts were sharply controverted. His findings were based upon the credibility of the various witnesses appearing before him. The chancellor, who heard the witnesses testify in open court, is better able to determine the credibility and weight to be given the testimony than a reviewing court. In this State the rule is too well settled to require or justify the citation of authorities, that where a decision depends upon the credibility of witnesses the finding of the chancellor will not be reversed unless it is clearly manifest that a palpable error has been committed. (**Mosbacher** v. **Mees**, 347 Ill. 115; **Pribyl** v. **Pribyl**, 250 Ill. App. 351.)

Accordingly, the decree of the Circuit Court of Shelby County is affirmed.

Affirmed.

Gen. No. 8681 Agenda No. 23

OCTOBER TERM, 1932

Petrinelle Deltuva, Appellee,

—v—

Albert Yuochunas, Appellant.

Appeal from the Circuit Court of Vermilion County.

SHURTLEFF, J.

The action is trespass on the case to recover damages for personal injury. The appellee is Petrinelle Deltuva and the appellant is Albert Yuochunas. This is a guest case within the terms of the statute enacted in 1931, par. 43 of the Motor Vehicle Act, which forbids a recovery except in such cases as the injury is due to the willful and wanton misconduct of the driver or owner.

The car in which appellee was riding was a Ford sedan. It was occupied by Miss Deltuva, who sat on the back seat with the appellant, and a young lady named Sanders, who sat with Rubis, the driver. Miss Sanders lived in Georgetown, about ten miles south of Danville, while the other three lived in Westville about six miles south of Danville. The highway is known as No. 1, runs north and south and at the place in question is straight and level. The improved portion is paved to a width of about twenty feet. At the time in question it was undergoing repairs and the west half was barricated for about four hundred feet. This barricade extended northward to about four or five hundred feet from the south limits of Westville, which closed the south-bound traffic lane and permitted one-way passage on the east half of the pavement, leaving for travel a width of about ten feet. The shoulder

on the east side of the pavement, according to the declaration, was six inches lower than the pavement and a pile of loose dirt had been dumped on it.

The party with whom appellee was riding had been to a motion picture show in Danville and had gone to Georgetown, taking the Sanders girl home, and were returning to Westville, travelling north. After passing the barricade to a point stated to have been about two hundred feet from the village limits, another car was encountered, driven by a young man named Varner. At this point a collision occurred as a result of which the Ford came to rest upside down five or six feet west of the pavement and about the same distance north of the Varner car and the Varner car was more or less on the west side of the pavement.

The collision did not occur head-on but as described by Varner in a sort of northwest angle. The damage to the Varner car was largely on its right side. Varner's version is that he was on his own side of the road and that appellant's car turned suddenly to the left in front of him.

Rubis and Yuochunas say that as the Varner car approached it was on the east half of the road and when the collision was imminent the driver, for the purpose of avoiding the crash, turned to the left to get out of its way. The time of the accident was midnight, November 15, 1931.

As stated, the case is based upon wanton and wilful negligence. The averments in the declaration are that the Yuochunas car was driven through the single lane at a speed of fifty miles an hour and at a like speed for the next two hundred feet; that the driver then turned his automobile to the left in an attempt to pass the automobile of said Varner and then and there wantonly and willfully drove his automobile against the automobile of said Varner, wantonly and willfully injuring appellee.

Appellee was unable to give any evidence as to just how or why the accident happened. She testified to the speed, but did not see the Varner car until it was so close that the only description she could give was that "the collision and the turning to the left and the sight of the Varner car happened immediately—quick as a flash."

Appellant, by his counsel, presented motions for a directed verdict at the close of appellee's case and again at the close of all the evidence, urging that the evidence was not sufficient to prove that the injury was wantonly and willfully inflicted.

Miss Deltuva testified that the car several times went off of the shoulder on the right hand side, but the evidence does not show what the occasion was nor that it occurred near the place of the accident. On cross-examination she stated that she told Albert to be careful, but what the occasion was or where it was said the record leaves to conjecture.

The verdict was for fifteen hundred dollars and judgment was entered for that amount after the motion for a new trial was denied. Appellant has brought the record to this court by appeal for review.

The only testimony in the record tending to show any willful and wanton injury was given by Elmer Varner, who was driving the other car. He testified: As this car approached me it was on the west side of the pavement. I was driving south and the other car was coming north and he turned in front of me just as he got to me. When he turned in front of me I was on the west half of the pavement. I put on my brakes. They are four wheel brakes and were in good order; put them on almost at the same time as the collision. The other car nicked my left fender and tore the radiator off and knocked the right wheel down and tore the hood

off and broke the windshield and frame of my car on the right side. The wheel which was broken down was the right front wheel. The tire and rim were knocked off and there were several spokes left.

At the time of the collision my car was headed south and the other car was headed northwest. The collision was not head on. It hit me "at a kinda northwest angle." The Ford car jumped over the engine of our car and into the ditch. I do not think my car moved over a foot or two; it stopped instantly.

As I approached I had my dimmers on. I think the other fellow had on his bright lights. After the accident, I observed the position of the Ford car. It was turned over in the ditch about six feet north of my car and in the ditch about six feet west. I was driving around thirty miles an hour.

Appellant and Rubis each testified that appellant's car, in which appellee was riding, was at all times on the right hand side of the road going north until they approached the Varner car, which was travelling on the left hand side of the road and was over the black line, and that Rubis was compelled to veer his car to the left to avoid a head on collision.

Other disinterested witnesses placed the location of the cars after the accident as set out in the statement and the proofs.

The testimony of appellant and Rubis is somewhat corroborated by the impossible story told by Varner as to appellant's car "jumping over the Varner car." The testimony of Varner in some particulars does tend to show a willful and wanton injury, but upon going carefully over all the proofs we conclude the verdict and judgment are against the manifest weight of the testimony, upon which ground appellant has assigned error.

Varner has also a suit pending against appellant growing out of this accident.

Some complaint is made as to certain of the instructions given for appellee. As the case is to be remanded for another trial, doubtless any errors in the instructions will be corrected.

For the reasons stated, the judgment and verdict of the Circuit Court of Vermilion County are reversed and the cause remanded for another trial.

Reversed and Remanded.

General No. 8690 Agenda No. 32

OCTOBER TERM, 1932

Edward J. Cullinan, Appellant,

v.

Richard A. Cullinan, Appellee.

Appeal from the Circuit Court of Tazewell County.

SHURTLEFF, J.

This is a suit brought by appellant against appellee to recover the pay for certain gravel, claimed to have been sold by appellant to appellee.

The declaration consists of the common counts and was filed April 23, 1930. With the declaration was filed an affidavit of claim made by the plaintiff which states that "the demand of the plaintiff is for gravel sold to the defendant, and that there is now due from the defendant to the plaintiff, after allowing all just credits, deductions and set-offs, the sum of $2,250.56."

A bill of particulars was filed, as follows:

"Richard A. Cullinan to Edward J. Cullinan, Dr. To 11,252.8 cubic yards of gravel at 20c per cubic yard, $2,250.56, furnished by the plaintiff to the defendant between the months of August and December, 1928."

On October 1, 1930, appellee filed the general issue and two special pleas. No affidavit of meritorious defense was filed with the pleas. On motion to strike pleas for failure to file affidavit of merits, the appellee, on December 2, 1931, filed his affidavit of meritorious defense, wherein he states:

"That the defendant herein never purchased gravel from the plaintiff between the months of August and December, 1928; and further never agreed during this time to purchase any gravel from the plaintiff; and further never accepted, received or ever took any gravel belonging to the plaintiff during this time."

Plaintiff filed a motion to strike the special pleas and thereupon appellee withdrew the special pleas and filed an additional affidavit by leave of court, as follows:

"That the defendant herein never purchased gravel from the plaintiff between the months of August and December, 1928, or any other time; and further never agreed during this time to purchase any gravel from the plaintiff; and further never accepted, received, or ever took any gravel belonging to the plaintiff during this time. * * * That the plaintiff herein was in possession of a farm owned by John Fitzgerald, now deceased, in sections 11 and 14, Dillon Township, and that the defendant herein took some gravel from said farm on an arrangement with John Fitzgerald, now deceased, whom this defendant understood and believed owned said farm, and the plaintiff herein was present and in possession of this farm at the time the defendant took some gravel, and saw the defendant deal with the said John Fitzgerald and take said gravel from the premises, and the plaintiff never informed the defendant that he, the plaintiff, claimed any right or interest in the gravel, or in the property except as tenant, and the plaintiff knew that the defendant was dealing with John Fitzgerald as owner, and never at any time informed the defendant that he claimed to be owner. Therefore, the plaintiff herein is, because of his actions heretofore set forth, estopped from making any claim against this defendant."

Upon a trial by jury there was a verdict and judgment for appellee and appellant has appealed.

In order to understand the nature of the issues in this case, we subjoin the statement of the case by appellant and the facts which his proofs tended to establish.

Edward J. Cullinan, appellant, is a farmer and for many years prior to May 17, 1928 was a tenant on the farm from which the gravel for which this suit was brought was taken. Prior to this date the farm was owned by John Fitzgerald, who was a half brother of appellant. The appellee, Richard A. Cullinan, is a nephew of appellant.

On May 17, 1928, the appellant agreed to purchase the farm, consisting of 560 acres, from John Fitzgerald. The consideration for the purchase of the farm was seventy thousand dollars. Fifteen hundred dollars was to be paid in cash and the indebtedness of $23,500 and interest owing to appellant by John Fitzgerald was to be canceled and the balance of $44,800 was to be secured by a mortgage on the farm. On May 22, 1928, John Fitzgerald and wife executed a deed conveying said farm to the plaintiff. The deed is dated May 22, 1928, and purports to be acknowledged on June 2, 1928. On May 23, 1928, the appellant and his wife made and executed their trust deed to John Fitzgerald, as trustee, conveying said farm to him by such trust deed to secure the balance of said purchase price of $44,800, which was the amount to be secured by mortgage agreed upon in the purchase of the farm by appellant. This trust deed was acknowledged on May 23, 1928. At the time the deed was made from John Fitzgerald and wife to the appellant and the trust deed from the appellant and wife to Fitzgerald, appellant did not have the notes evidencing the indebtedness of John Fitzgerald to him, and Fitzgerald then suggested to appellant that appellant and his wife execute a deed for the farm back to Fitzgerald, to be

held by him and not recorded until the notes could be turned over to him, and, with this understanding, the deed, appellee's exhibit 1, was made, bearing date and acknowledged on May 23, 1928.

After the deed from Fitzgerald to appellant was executed it was delivered to appellant and upon suggestion of Fitzgerald that he would have the deed recorded appellant left it with him for that purpose. The deed from Fitzgerald to appellant and the trust deed from appellant to Fitzgerald were filed for record June 13, 1928. Appellant examined the records on June 15, 1928, to ascertain if the deed from Fitzgerald to him had been recorded and he found it had been.

The deed, appellee's exhibit 1, from appellant and wife to John Fitzgerald, was not filed with the deed and trust deed and was not on record when appellant examined the records on June 15. It was filed for record on June 18, 1928. Appellant did not know that this deed had been filed for record until September 23, 1928, the day after Fitzgerald made the assignment for the benefit of his creditors. It does not appear from the record that the appellee, Richard A. Cullinan, had any knowledge of the deed from Edward J. Cullinan to John Fitzgerald except such information as he obtained from the appellant in a conversation at Tremont in September, 1928.

Appellant continued in the possession of the farm and did not pay any rent on the farm after March 1, 1928. He farmed the farm and claimed to own it. On September 22, 1928, John Fitzgerald made an assignment for the benefit of his creditors. This assignment was in the form of a deed of assignment and was filed for record on September 22, 1928, and duly recorded in the Recorder's office of Tazewell County. The assignment was a general assignment of all his property of whatsoever kind and character without

specific description of either real estate or personal property. After this assignment and on September 27, 1928, the appellee was awarded the work of the graveling of several miles of road in Tazewell County in the vicinity of the Fitzgerald farm. A short time after this work was let to appellee and on or about October 3, 1928, the appellee came to the home of the appellant on the Fitzgerald farm where he was living and asked appellant if he would sell him gravel and told him that he would like to get the gravel because it was handy to the contract he had. Appellant gave him no definite information at that time, but appellee returned two or three days later and again inquired if appellant would sell him the gravel and at that time appellant told him that no gravel would go out of the place less than twenty cents a yard and the appellee agreed to pay the twenty cents per yard. On account of the assignment of John Fitzgerald for the benefit of the creditors and the fact that appellant had recently learned that the deed he had given to Fitzgerald which Fitzgerald agreed to hold and not record, had been recorded, the appellant then stated to appellee that he did not know whether he would be allowed to collect for the gravel, the deed being recorded. Appellee then told appellant that "whenever this is settled I will pay whoever is entitled to the gravel, twenty cents a yard for it." Appellee then subcontracted the hauling of the gravel and a short time afterwards the removal of the gravel purchased by the appellee was commenced and was completed in the latter part of November, 1928. The amount of the gravel removed by appellee by the subcontractors was 11,252.8 yards. For this appellant should receive $2,250.56. On account of the deed from appellant to Fitzgerald being recorded and of the assignment of Fitzgerald for the benefit of his creditors the appellant pursuant to the agreement of appellee that "he would pay whoever was entitled to it," made no further demand on appellee

for the pay for the gravel.

In November, 1928, John Fitzgerald was adjudged a bankrupt. Mr. Champion was the acting trustee. Appellant filed his suit to set aside deed in the Federal Court against the trustee in bankruptcy and John Fitzgerald and others to recover the farm purchased by appellant from Fitzgerald, from which the gravel in question was removed. This suit was pending in the years 1929 and 1930. After this suit was filed, an agreement was reached between appellant and the trustee in bankruptcy which was approved by the order of the referee in bankruptcy, wherein the trustee in bankruptcy was authorized to convey to appellant the Fitzgerald farm and thereafter on March 24, 1930, the said trustee in bankruptcy by trustee's deed conveyed said farm to appellant, which deed was filed for record April 7, 1930. The order approving the settlement of the suit in the Federal court and the sale and transfer of the interest of said trustee in bankruptcy to appellant also disposed of the claim to the gravel as follows:

"It is further ordered that the claim or account scheduled by said bankrupt against R. A. Cullinan for gravel taken, or removed from said premises, and all rents from said premises and the proceeds thereof except the proceeds of such rents heretofore received by said trustee be released to the said Edward J. Cullinan as his property, pursuant to the provisions of said proposition for the sale and conveyance of said premises."

On April 8, 1930, the next day after appellant had filed his deed for record, appellant met appellee on the street in Tremont and told him that he had come to settle for the gravel; Appellee then told appellant that he would not pay for it until he had to and then he wouldn't pay but ten cents a yard. This ended the negotiations between appellant and appellee and resulted in the filing of this suit.

Appellee denied that he ever purchased any gravel from appellant, or ever had any of the conversations with appellant that were claimed, but testified that he purchased the gravel either the first week in September or the last week in August of 1928, and that he purchased the gravel from Fitzgerald because Fitzgerald was largely indebted to him and he expected to apply the gravel upon that account.

Appellee raises the question of estoppel against appellant in that appellant stood by and permitted him, appellee, to take and haul the gravel and never made any claim of ownership. On the suit brought by appellant in the United States District Court against Fitzgerald and the trustee in bankruptcy of his estate, to recover back the title to said lands, appellant produced the record of said suit, the compromise settlement that was made and the court record of a decree providing as follows:

"It is therefore ordered, adjudged and decreed by the court that the said E. V. Champion, trustee in bankruptcy, be and he is hereby authorized to accept the said bid of said Edward J. Cullinan for the sale and purchase of said above described real estate, in pursuance with the terms of said written proposal of sale filed by said proposed purchaser, Edward J. Cullinan herein, and it is further ordered that the trustee be and he is hereby authorized and directed to execute his deed as trustee in bankruptcy of the above bankrupt estate, conveying all of the interests of said trustee in bankruptcy, and of said bankrupt estate in and to the above described real estate, to the said Edward J. Cullinan, and in pursuance with the written proposal of purchase filed herein by said Edward J. Cullinan, upon the said Edward J. Cullinan complying with all the terms and provisions in said written proposal of sale.

"It is further ordered that the claim or account scheduled by said bankrupt against R. A. Cullinan for gravel taken, or removed from said premises and all rents from said premises and the proceeds thereof except the proceeds of such rents heretofore received by said trustee be released to the said Edward J. Cullinan as his property, pursuant to the provisions of said proposition for the sale and conveyance of said premises.

"Dated at Peoria, Illinois, this 25th day of March, A. D. 1930.

Carl Behrman,

Referee in Bankruptcy."

He also produced the deed of the trustee in bankruptcy conveying all of said lands to the appellant in the month of March, 1930, which were offered in evidence by appellant but upon objection by appellee the court sustained the objection and the instruments were excluded. The proofs showed that from the transactions in May, 1928, appellant had been in the exclusive possession of the lands, had paid no rents to anyone and had claimed to own them.

Appellee offered and the court gave appellee's fourth and fifth instructions, as follows:

"4. The jury are instructed that if you find from the evidence that the plaintiff was not the owner of the premises from which this gravel was taken and that someone else, other than the plaintiff, owned the premises, then in that state of the proof you should return a verdict for the defendant."

"5. The jury are instructed that before you can return a verdict in this case for the plaintiff, you must find that the plaintiff owned the gravel which was taken by the defendant herein."

Upon the giving of which and the excluding of said instruments appellant has assigned error.

There is a flat contradiction between appellant and appellee as to every detail of the negotiations between them. There is no dispute as to the conveyances covering the land and the purpose for which appellant executed the return conveyance to Fitzgerald. At the time of the trial Fitzgerald was dead. Appellee's defense is fully stated in his statement as follows:

"The action is assumpsit, and the plaintiff filed the common counts containing the usual formal allegations, generally made under this count. Attached to this count was the affidavit of claim, that the demand of the plaintiff is for gravel sold to the defendant and that there is now due $2,250.56. A motion for a bill of particulars was allowed and filed, in which it is set forth that 11,252.8 cubic yards of gravel at 20c per yard was furnished by plaintiff to the defendant, between the months of August and December, 1928. No other claim of appellant is made out in the pleadings, except as set forth by the plaintiff in the common counts,—affidavit of claim and bill of particulars.

"The general issue was filed by the defendant, appellee herein, and an affidavit of defense setting forth two defenses, (1) that the plaintiff did not own the gravel in 1928, so that he could not have furnished it to the defendant, and (2) that even if he had owned it, he stood by and let defendant deal with someone else, and that by reason of his silence, he must in any event be estopped from claiming this money."

Appellee testified to the following facts: I talked to Edward Cullinan either in the latter part of September or the first part of October. The conversation took place in the barnyard at the Fitzgerald farm; Edward Cullinan, Fred Fix and myself were present. This was a few days after I received this contract, the latter part of September or the first part of October. I

received the contract September 27th. In that conversation I told him that I received a contract to gravel this road and I had made arrangements with Fitzgerald and he told me I would have to make arrangements with the tenant regarding coming through there and I spoke to Ed about that. We discussed the Fitzgerald affair. He told me to fix up the drive and in driving through to keep off the meadow, if we done that, that is all he wanted. I asked him what damages I owed him for coming through and getting the gravel; he said that was all he expected; that I would fix up the road in good shape afterwards.

Whether appellee purchased the gravel from appellant and later stated to appellant that he would pay for it when it was determined to whom payment should be made, were facts to be determined by the jury. Whether appellee purchased the gravel from Fitzgerald and so stated to appellant, and appellant replied he was only interested in the repair of the roadway, are among the disputed facts to be passed on by the jury. Whether appellant was the owner of the land when the gravel was sold, was another of the disputed facts requiring the determination of the jury.

It is first contended by appellant that appellee cannot show estoppel **in pais** under a plea of the general issue, but upon the authority of **White** v. **Central Trust Co.**, 259 Ill. App. 74, and **Arnold** v. **Hart**, 176 Ill. 442, this contention must be overruled. There are numerous authorities cited by each party on the subject of estoppel and much of the briefs and argument are devoted to that subject.

Appellant insists the affidavit of merits does not show that appellee was injured in any way, but there was no motion to strike. Appellee offered to show upon the trial that Fitzgerald was indebted to him, but the court sustained objections to that testimony and appellee has made no cross assignment of error. The only

testimony in the record as to an indebtedness from appellee to Fitzgerald, consists of conversations between appellee and Fitzgerald as to applying the gravel money upon a note. The record contains no proof that there was a **bona fide** debt existing between them, without which appellee could not be injured, under the facts in this case. The doctrine of estoppel can be raised only in this case when it is established that appellant was the owner of the lands and the gravel sold, and that Fitzgerald owed a **bona fide** debt to appellee, upon which debt the proceeds of the gravel were a proper subject of application by the arrangement of Fitzgerald, with the consent of appellant. The facts proven in this case are not sufficient to raise that issue.

Reverting to the proofs, we are of the opinion that the court erred in sustaining the objection to the admission in evidence of the conveyance and release by the trustee in bankruptcy to appellant of the lands from which the gravel was taken. One of the issues in the case was the ownership of the lands and appellee's fourth and fifth instructions bore directly upon that question and directed a verdict. The giving of these instructions and the ruling upon the exclusion of evidence are contradictory rulings. We do not mean by that, that appellee could sue, under the pleadings in this case, as the assignee of the trustee in bankruptcy, but appellant's contention is that by the reconveyance of the lands to Fitzgerald, under date of May 23, 1928, (defendant's exhibit 1) the transaction was a mere pledge or mortgage to Fitzgerald to secure to Fitzgerald the return of old notes held by appellant, which Fitzgerald had given and agreed not to record this reconveyance. If such is the fact, and appellant returned the old notes, it became a dead pledge, and no title to said lands ever passed to **Fitzgerald by said conveyance** other than as a mortgage **pledge. (Fitch v. Wetherbee,** 110 Ill. 492; **Garden City Sand Co.** v. **Christley,** 289 id. 617).

Appellant all the time remained the owner of the legal and equitable title to said lands, subject to the mortgage and the pledge to deliver the old notes. The proceedings in the Federal court brought by appellant and the settlement arrived at, should throw much light upon the relation of appellant to said transactions and as to the ownership of the lands. The main issues in the case are, whether or not appellant sold the gravel to appellee, either by himself or an agent, and whether appellant was the owner of the lands at the time the gravel was taken.

For the errors shown upon the record, the judgment of the Circuit Court of Tazewell County is reversed and the cause remanded for another trial.

Reversed and Remanded.

Abstract
Opinion filed May 16, 1932

General No. 8677 Agenda No. 19

OCTOBER TERM, A. D. 1932

S. C. Van Horn, Appellant,

vs.

Harry Dorrell, Appellee.

Appeal from Circuit Court, McLean County.

ELDREDGE, P. J.

Appellant, S. C. Van Horn, at the time the controversy involved in this case arose was operating a farm of 290 acres of land under a lease. He had thereon and was the owner of certain farm equipment and live stock used by him in his farming operations. On March 1, 1931 he entered into a written contract with his son, Chester A. Van Horn, as follows:—

"FARM OPERATION CONTRACT.

"This Agreement made and entered into this 2nd day of March A. D. 1931, by and between S. C. Van Horn and Chester A. Van Horn, both of Heyworth, Illinois, as parties of the first and second parts, respectively, Witnesseth:

"Whereas, first party has heretofore and is now occupying what is known as the Brokaw farm of 290 acres in Section One (1) of Funks Grove Township, under a lease with the owner, and is possessed of certain live stock, farming equipment, feed and seed to continue the farming operation of said tract, and

"Whereas first party is desirous of turning over to second party the active operation of said farm for the coming year, under the supervision and direction of first party, and

"Whereas second party is minded to take over said farming operation with the equipment belonging to first party upon a profit sharing basis,

"Therefore for and in consideration of the sum of One Dollar ($1.00) paid by second party to first party, receipt whereof is hereby acknowledged, and the mutual benefit and advantages resulting herefrom to the parties hereto, it is hereby stipulated and agreed as follows:

"First: Party of the first part hereby agrees to permit party of the second part to use under his supervision, control and direction all of the equipment, owned by party of the first part, now on said premises, consisting of 7 head of horses, 11 cows and heifers, 5 brood sows, and farm machinery and including the necessary feed and seed now on the premises, to carry the said live stock through the coming farming season, and seed for planting, etc., the said live stock, farming equipment, to be used and taken care of by the said party of the second part in a proper manner as hereinafter more specifically set forth.

"Second: Party of the second part is to take over the active work of the farming, caring for the live stock, marketing of the crops and produce, and to relieve party of the first part from any connection therewith except that party of the first part retains the sole management, control and direction of how the operations are to be carried on.

"Third: Out of the undivided crops grown on the said premises, during the coming cropping season, party of the second part shall leave as much feed and seed on the premises on March 1, 1932, upon the expiration of this operating agreement, as he received for use March 1, 1931, the same when so left to belong to and to be the property of the party of the first part.

"Fourth: It is mutually understood and agreed that this is a contract for operation upon a profit sharing basis and not as a partnership or lease, and the party of the second part shall receive in full payment, settlement and satisfaction to him for his services in operating the said farm under this contract, one-half of the net proceeds from all grains and produce marketed from the said place during the year extending from March 1, 1931, to March 1, 1932, less the feed and seed which is first to be deducted before crop division is made.

"Fifth: It is mutually understood and agreed that second party's share of the said proceeds shall extend to and include one-half of the increase of live stock and one-half of the milk and cream that is marketed, and it is further understood and agreed that in case any money is advanced to party of the second part by party of the first part during the period of this contract, it shall be repaid to party of the first part out of the share of the party of the second part.

"Sixth: It is further stipulated and agreed that party of the second part is to give his personal, individual services in carrying out the terms of this contract, and shall not depend upon hired help to see that the necessary farming and caring of live stock is performed.

"Seventh: It is further agreed and understood that this contract shall be in full force and effect, and shall continue for a period of one year from March 1, 1931, subject however, to extension or renewal as the parties may hereinafter determine, but so far as this contract is concerned its date of termination is March 1, 1932.

"Witness our hands and seals, this 2nd day of March, A. D. 1931.

S. C. Van Horn, (Seal)
Chester A. Van Horn. (Seal)"

Chester A. Van Horn took possession of the premises under the contract and continued to farm the land under its terms until September 17, 1931, when appellant served notice on him to quit possession of the farm on account of some differences which had arisen between the father and the son. When Chester left the farm he took with him twenty-six hogs and two calves, which comprised one-half in number of the live stock increase. He sold nineteen of these hogs to appellee. Appellant instituted this suit in replevin to recover them from appellee before a Justice of the Peace. Upon an appeal to the Circuit Court of McLean County the trial resulted in a verdict and judgment for appellee and a writ retorno was ordered.

By virtue of the second provision of the contract Chester A. Van Horn has authority to market the crops and produce of the farm. Under the fourth provision he was to receive as compensation for his services one-half of the net proceeds from all grains and produce marketed from the farm, and under the fifth provision his share of the proceeds from said farm shall extend to and include one-half of the increase of live stock and one-half of the milk and cream that is marketed.

Under the above terms of the contract Chester A. Van Horn

was authorized and empowered to market the produce of the farm including the live stock and he was to receive as his own compensation one-half of the increase of the live stock raised thereon. When his father saw fit to dispossess him of the farm he took nothing therefrom except one-half of the increase in the hogs and calves. He sold nineteen of the hogs to appellee for $105.00. Appellee was an innocent purchaser for value without notice of the equities, if there were any, between the parties. Regardless of the other alleged errors we hold that the judgment was right and it is therefore affirmed.

General No. 8692 Agenda No. 34

OCTOBER TERM, A. D. 1932

Kate Albers and Carrie Menken, Appellants,

vs.

Tobias N. Rademaker, Remer Rademaker, Ulfret Rademaker and Mary Harms, Appellees.

Appeal from Circuit Court, Logan County.

ELDREDGE, P. J.

Wibke Rademaker, a widow and resident of Logan County, died July 7, 1931 intestate leaving surviving her Kate Albers, Carrie Menken, Mary Harms, her daughters, and Tobias N. Rademaker, Remer Rademaker and Ulfret Rademaker, her sons, as her only heirs at law. She died seized of 120 acres of farm land and some town lots in Logan County, also personal property of about the value of $5,000.00. All of her sons lived in Logan County, Mary Harms resided in Tazewell County, Carrie Menken in McLean County and Kate Albers in Whiteside County at the time of their mother's death.

On July 13, 1931 Kate Albers filed her petition for letters of administration upon the estate of her mother in the County Court of Logan County. The County Court entered an order appointing her administratrix of said estate upon filing a bond

in the penal sum of $3,000.00. She filed a bond in which no penalty was named and the Court inadvertently approved it. On July 15, 1931 the three sons of the deceased filed their petition in the County Court praying that said letters of administration granted to Kate Albers be recalled and cancelled and that letters of administration be issued to some one or more of the children of the deceased who were residents of Logan County. Upon a hearing upon said petition the County Court entered an order revoking the letters of administration theretofore issued to Kate Albers and vacated its order approving said supposed bond.

On July 30, 1931 the three sons of the deceased and the daughter, Mary Harms, filed an additional petition in the County Court requesting that Tobias N. Rademaker be appointed administrator. This petition was granted and the appointment made. Whereupon an appeal was taken by appellants to the Circuit Court which sustained the order of the County Court.

We can see no reason for reversing the judgments of the County and Circuit Courts. The original appointment of Kate Albers as administratrix was in fact void for the reason that she never lawfully qualified as such by filing a proper bond. The County Court could in its discretion appoint any one of these

children administrator of the estate as neither one had a priority of appointment over the other. And as it appears that a majority of them desired Tobias N. Rademaker to act as administrator and no sufficient reason appearing why he should not act as such it was within the discretion of the County Court to so appoint him.

The judgments of the County and Circuit Courts of Logan County are affirmed.

abstract

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269 I.A. 663

General No. 8708 Agenda No. 46

OCTOBER TERM, A. D. 1932

Minnie F. Robinson, Appellant,

vs.

Skiles, Rearick and Co., Bankers, Incorporated, a State Banking Corporation, Appellee.

Appeal from Circuit Court, Cass County.

ELDREDGE, P. J.

This is an action in assumpsit brought by appellant to recover $7079.17 deposited by her in the Bank of appellee. The cause was submitted to the Court for trial without the intervention of a jury and the Court found the issues joined in favor of appellee and judgment was entered on such finding, to reverse which this appeal is prosecuted.

The declaration consists of the consolidated common counts. On motion of appellee an amended bill of particulars was filed by appellant in which she states therein that her cause of action is for money had and received by the defendant for the use of the plaintiff and for interest and forbearance; that plaintiff had on deposit with defendant to her credit the sum of $7,356.18; that thereafter she deposited large sums of money amounting to, to-wit, $10,000.00, and she thereafter checked on and withdrew

from said account from and after August 7, 1929, to September 21, 1931, divers sums of money leaving a balance due the plaintiff from the defendant of $7079.17, with interest thereon at 5% from August 7, 1929, which said sums of money on September 21, 1931, together with interest and forbearance thereon from said date, were due, owing and unpaid, and although the defendant was requested to pay the same by plaintiff, the defendant failed and refused so to do, and that on the trial of this cause the plaintiff seeks to recover from the defendant the said sum of $7079.17 with interest thereon from August 7, 1929 at 5%.

After the trial was commenced the parties entered into the following stipulation:— "It is stipulated and agreed between the parties that all deposits to the account of plaintiff with defendant bank are correct, as shown in book marked Exhibit 'A'; that all charges to plaintiff in said Exhibit 'A' are proper charges and are shown by checks drawn and paid by defendant, except that the charges to her of $5,062.50 and $2,016.67, shown by a memoranda dated November 16, 1929, which charge, and the interest on said money is the only question involved in this case, and the charge of the memoranda of that money is in dispute; that the names, Minnie S. Robinson, Mrs. Minnie Swain Robinson, Minnie F. Robinson, Minnie F. Swain Robinson, Minnie Swain Robinson, Minnie S. F. Robinson, Minnie Swain, Mrs. J. T. Swain, Mrs. Minnie Swain and Mrs. John T. Swain, in said memoranda, said pass book and said ledger account, all refer to the same person, to-wit: Minnie F. Robinson, the plaintiff herein." Exhibit "A" referred to in the stipulation is the pass book issued to her by appellee covering the period from August 7, 1929 to April 20, 1931. Appellant has been married twice. She first opened an account in appellee's Bank June 24, 1919 by the deposit of $200.00. At

that time she was the wife of John T. Swain and the account was opened in her then name. Subsequently her then husband died and on May 13, 1920 she deposited in the Bank $12,049.29, moneys received by her personally and as guardian of her then children from the estate of her husband John T. Swain. Subsequently she married her present husband, Edgar Robinson. On May 22, 1920 she loaned $7,000.00 and checked out that amount from her account in the Bank. On July 7, 1920 she checked out $5,000.00 for another loan. On May 21, 1923 the loans first mentioned were paid, together with the interest thereon, amounting in all to $7420.00 and she deposited this money in the Bank. From that time on different loans were made by her and as the interest was paid thereon it was deposited in the Bank to her credit and her account varied approximately between $7,000.00 and $7500.00 until November 16, 1929 when the events took place which are in controversy in this suit. On this last mentioned date she had to her credit in the Bank $7389.86. On this day the Bank transferred to her certain Edgewater Plaza Apartment Bonds of the par value with accrued interest of $5,062.50, and also certain bonds known as 333 North Michigan Avenue Building Bonds of the par value together with accrued interest of $2,016.67. These bonds had been

bought several years before by the Bank for its own investment and appellant claims she never purchased the same from the Bank nor authorized the assignment of them to her, while appellee claims that they were transferred to her at her instance and request. These conflicting contentions of the parties comprise the only controversy in this case and present purely a question of fact to be determined by the evidence.

The books of the Bank show the transaction in detail. The Bank continued to collect the semi-annual interest paid on these bonds and credited the same to appellant's account on its books and in her pass book. When her pass book was balanced April 1, 1930 her checks were returned to her together with the following memorandum:—

"Defts Ex-1
Mrs Minnie Swain Robinson

Edgewater Plaza Apartment Bonds...	$5000.00
Interest on same to Sept. 1st, 1929.....	62.50
Total	$5062.50
333 North Mich Ave Bldg Bonds.....	$2000.00
Interest on same to Sept 1st 1929.....	16.67
Total	$2016.67

Nov 16 1929"

Subsequently default was made in the payment of interest on these bonds and on August 12, 1930 appellant executed at the request of the officials of the Bank the following document:—

"Mrs. Minnie Swain Robinson

Ashland, Illinois, Aug. 12" 1930.

In as much as there has been a committee organized for the protection of the Bond holders of the Equitable Bond and Mortgage Co, which has been necessary by defalt having occured in payment of interest in a number of bonds issued, requiring imediate action for the protection of the bond holders of these bonds.

Now in as much as I am the holder and owner of the following Equitable bonds;—

Edgewater Plaza Apartment, 5421-23-25 Kenmore Ave, Chicago, Illinois, No. M697. M698. M699. M700. M701 for $1.000. each or $5.000. and I herewith instruct and request the Skiles Rearick & Co, Bank, of Ashland, Illinois to foward said bonds with the coupons unpaid attached to the Chicago Tital and Trust Co, of Chicago, Illinois, as depositary for said committee, and to take any other action they deem best to protect my interest.

(Signed) Minnie F. Robinson

Owner of above Bonds."

The President and Cashier of the Bank testified that prior to November 16, 1929 the Bank had itself been paying to appellant 6% interest on $7,000.00 of her deposit; that soon after September 1, 1929 the President told her that the Bank could not continue to pay her 6% interest on her money any longer and that she would have to try and place her money somewhere else, invest it in some other way; that she asked him if the Bank had anything it could sell her or anything it could turn over to her and that he replied that at that time it did not; that she went away and said she would see what she could do and afterwards came back and said she had not been able to find any place for her money and wanted to know if the Bank had anything to offer her to invest her money in, and he told her it had some bonds that it would turn over to

her if she wanted to invest in them and explained to her what the bonds were; that she returned later and said she would think about it and let him know, and within a few weeks or a month she returned again and said that she had thought about and considered the question of buying those bonds, at which time the Cashier showed her the bonds and told her about them and she decided to take the bonds; that the Cashier figured up the accrued interest on them and she bought the bonds. Appellant denied that she ever had any such conversations with the President and Cashier of the Bank and never knew anything about the bonds, and that no such transaction ever took place to her knowledge; that during the Fall of 1929 she was pregnant and about to have a child and was confined to her house and did not go into the Bank or anywhere else except to her neighbors. It is hard to reconcile her testimony with the documentary proof in evidence which is undisputed. Her pass book and the memorandum of the transaction she had in her possession for over four months and it is highly improbable that she never examined them or paid any attention to them. During all this time she never made any protest to the Bank or ever in any way repudiated the transaction. She signed the document by which the bonds were sent to the Chicago Title & Trust Company as depositary for the

committee in which she declared she was the holder and owner thereof. The Court had to determine the facts from a preponderance of the evidence and also the credibility of the witnesses. In our opinion the evidence sustains his conclusions and the judgment of the Circuit Court is affirmed.

General No. 8671 Agenda 15

OCTOBER TERM, 1932

H. A. Shank, Appellee,

vs.

Alva F. Adams, Appellant.

Appeal from Vermilion.

NIEHAUS, J.

In this case an appeal is prosecuted by Alva F. Adams, the appellant, from a judgment rendered against him in the Circuit Court of Vermilion County in favor of H. A. Shank, the appellee, in the sum of $150.00. The judgment is based on the verdict rendered by a jury on the trial of the cause.

The record discloses, that the appellant was a Road Contractor; and had entered into a contract to construct certain State Aid roads; and under his contract was required in connection with the building of the roads, to build certain drains and culverts; and for the building of the drains and culverts had, under a written contract with the appellee, a cement contractor, sublet the concrete work for constructing the drains and culverts referred to, which were located near the Village of Bismarck in Vermilion County. He also entered into a verbal agreement with appellee for the construction of culverts and drains connected with another road in the eastern part of Vermilion County. The work under the verbal agreement was to be done on what is known as the Seyfert culvert. It is the contention of the appellee, that he had fully performed his written contract with the appellant; and that there was due him for that work the sum of $718.57. This amount is not disputed by appellant, but the appellant claimed a set-off in addition to the amount of regular payments made thereon, amounting to $102.27 against the balance due the appellee; and this set-off was the matter of controversy in the case, the appellee contending, that the correct amount of set-off which the appellant was entitled to amounted to only the sum of $64.70.

Concerning the work to be done under the verbal contract the appellee testified on the trial of the case in the Circuit Court, that this work was to be done by him, under his contract at unit

prices; but that before he got through with the work, and after he had commenced the work on one culvert, for the Seyfert Job, the appellant peremptorily stopped him from completing it; and then turned it over to another man for completion. On the other hand, the appellant contended on the trial, that his understanding with the appellee was, that he was not to have the building of the culvert and tile drain under any circumstances, unless he could get to work and complete it promptly; and that appellee failed to do so; and that therefore he had hired other persons to build the culvert and tile drain referred to. This matter was another controverted question of fact in the case.

The appellee testified that at unit prices he would have realized a profit from carrying into effect his contract with the appellant for constructing the culvert mentioned, the sum of $39.00; and that the profit which he could have realized for the construction of the tile drain would have amounted to the sum of $40.00; and that the total amount remaining due him and unpaid under both contracts was $165.00; and the amount due appellee was the main controverted question in the case.

The appellant's contention is that, he does not owe the appellee anything; that there was a settlement of the matter in dispute by which the appellee accepted a check for $125.00 in full settlement and satisfaction of the amount claimed by him to be due; and signed a receipt to that effect, which was put in evidence on the trial. Lowell Kirby, a witness for the appellant, who had charge of the matter of making payment for construction work under the contracts in question, testified, that he prepared the receipt referred to and that the appellee was present when he did it; and that the appellee signed it in his presence; that the figures, $125.00, were in the receipt at the time it was signed by the appellee; that there were also four copies signed in blank at the same time; and that the receipt was signed as a settlement; and that after the appellee had signed it, both the receipt and a check for $125.00 which had been signed by the appellant, were left in the office; and that afterwards check was delivered to the appellee in connection with the receipt; and that the receipt had remained in his

possession since the time is was signed. The appellee testified concerning the same matter, that when he signed the receipt for full settlement, the amount was not in the receipt; and was to be inserted afterwards when it had been agreed upon; and that he accepted the check for $125.00 as he had a number of other checks, at the time he received it, on account; that afterwards he tried on several occasions to come to an understanding with the appellant to get a full settlement of the matters in controversy, but that the appellant evaded meeting him for that purpose; and that on that account settlement was never reached.

The only questions raised on appeal, are questions of fact. The appellant argues, that the verdict of the jury was contrary to the weight of the evidence; and that therefore the Court erred in not granting appellant's motion for a new trial. Whether the weight of the evidence concerning the controverted matters concerning the amount claimed due by the appellee, and the set-off claimed by the appellant; and whether the appellee signed the receipt with the understanding that $125.00 was to be in full settlement of his claim, were matters which were within the province of the jury to determine; and the determination of the question whether the weight of the evidence was for or against the verdict depends upon how much or how little credence the jury gave to the different witnesses who testified in the case. It is evident from the verdict that the jury determined that the appellee's version of the matters in controversy was the true one. This Court would not be justified in holding that they should have found otherwise; nor would the Court be justified in reversing the judgment unless the verdict of the jury was manifestly against the weight of the evidence. The evidence in the record clearly sustains the verdict if the jury believed appellee and his witnesses.

For the reasons stated the judgment is affirmed.

General No. 8700 Agenda 38

OCTOBER TERM, 1932

William Haas, Appellee,

vs.

Thomas Thornber, Appellant.

Appeal from Hancock.

NIEHAUS, J.

In this case a judgment by confession was entered for the sum of $957.29 in favor of the appellee, William Haas, and against the appellant, Thomas W. Thornber, in the Circuit Court of Hancock County at the October term, 1931. After entry of the judgment the appellant filed a motion, supported by affidavit, to open the judgment and for leave of Court to plead in defense. In the affidavit filed to open the judgment the appellant states the following facts as a basis of his right to make a defense, namely: That he had no notice or knowledge of the entry of the judgment against him, nor of the execution which was issued upon the judgment; the execution having been issued and delivered to the Sheriff on the day of the date of the judgment; but was not served upon him; and was returned on the 19th day of January, 1932 without being served; that no notice whatsoever of said execution and judgment was ever given to the appellant; and no notice whatsoever of the rendition of said judgment; nor the issuance of the execution nor the return of said execution by the Sheriff. That he had no notice of said judgment or said execution either directly or indirectly; that said judgment now stands of record as a lien upon the real estate now owned by the appellant. That said judgment was and is a judgment taken by confession upon a certain purported void promisory note, which is in words and figures as follows:

"$800.00 No. 40328

Nauvoo, Illinois, May 2, 1930.

—nine months after date value received, we, or either of us, promise to pay to the order of the

First Trust & Savings Bank of Nauvoo

$800 and 00 Cts. Dollars

at its banking house in Nauvoo, Illinois, with interest from date at -6- per cent per annum, payable annually, and if not paid when due and placed in the hands of an attorney for collection, the further sum of reasonable attorney's fees and cost of collection, the same to be included in any judgment rendered hereon. The makers and all endorsers hereof severally waive presentment for payment, notice of non-payment, protest and notice of protest of this note. And to secure the payment of said amount authority is given irrevocably to any attorney of any Court of Record to appear for the undersigned in said Court, in term time or vacation, at any time hereafter, and confess judgment without process in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs, and ten per cent attorney's fees, and also to file a cognovit for the amount thereof, with an agreement therein that no writ of error or appeal shall be prosecuted upon said judgment nor any bill in equity filed to interfere in any manner therewith and to waive and release all errors in any such proceedings, and consent to an immediate execution upon said judgment, all that said attorney may do by virtue hereof being hereby ratified.

Due..... Thos. W. Thornber (L. S.)

Post Office..... .....(L. S.)"

That said note is endorsed on the back thereof:

"Pay to the Order of Wm. Haas
First Trust & Savings Bank
G. F. Dachroth, Cash"

That while the signature thereto is his signature, yet he did not place such signature thereto as the same now appears. That there has been a material alteration made in said note since he signed

the same, in this, that at the time his signature was affixed thereto, the same was made payable three months after the date thereof; that the due date since the signing of said note has been changed, so as to make the same read: "Nine months after date." That the same has been altered as to the rate of 7 per cent interest mentioned in said note; that as originally written the note drew 7% interest; that the same has been changed to read 6% per annum; that said note was made and delivered to said bank on May 2, 1930; and was signed on that date; and that at the time of the making, signing and delivering of said note by the appellant, the same read three months after date and bore 7% interest; that such alterations in said note were made by someone without any authority whatsoever, directly or indirectly, from the appellant, subsequent to the time of making, signing and delivering said note to said bank, the payee therein named. That the appellant has a good defense to the suit on the merits to the whole of appellee's demand, the nature of which defense is as specified. That at no time, either before or after the making, executing and delivering of said note did appellant receive anything of value from the appellee; that a short time before the due date mentioned in the original note, he paid said bank the full amount, evidenced by the note as originally made and delivered; and was told by the cashier of said bank, at the time he made such payment, that his note was in the Continental Illinois Bank & Trust Company of Chicago, Illinois; and that as soon as the same was returned, that it would be delivered to the appellant; that on the 8th day of September, 1930, said First Trust & Savings Bank closed its doors and the Receiver therefor was afterwards appointed; and that said bank is now in process of liquidation. That about a month prior to the closing of said bank, appellant applied to it for his note and that they informed him that they had sent to Chicago for the note and it should have been there on that date; and that said bank wholly failed to return said note; that the first time he ever knew of said note was the closing of said bank about September 15, 1930; that about six weeks after said bank closed he made a careful examination of said note in the presence of appellee and his wife and told them at that time that the note had been altered;

that from that time on appellee never at any time asked appellant to pay said note and no attorney nor official of any character requested that appellant pay said note; that the first knowledge or information appellant ever had of any claim being made by the appellee against him on said note was on the 25th day of April, 1932; that at that time Leo Haas, a son of Appellee, informed the appellant that they had just taken judgment on this note; that thereupon appellant went to the Court House in Carthage, to the office of the Circuit Clerk, and learned for the first time that the judgment in this case had been taken; that appellant thereupon immediately consulted counsel, with a view of seeing what could be done about the matter.

The appellee in contesting appellant's legal right to have the judgment opened filed a counter affidavit stating that he had acquired said note from the First Trust & Savings Bank of Nauvoo, Illinois and that he purchased the note shortly after its execution, May 2, 1930, for the sum of $800.00; that at the time he purchased the same the First Trust & Savings Bank of Nauvoo, endorsed the same to this affiant by "G. F. Dachroth Cash", its cashier; that the note was purchased by the appellee from said bank in good faith and full payment was made to said bank for said note. The affidavit also states that the First Trust & Savings Bank of Nauvoo ceased doing business in the month of September, 1930; that shortly after the close of the bank the appellee exhibited the note on which judgment was confessed, to the appellant herein, and that he admitted said note to be his true and genuine note and the signature thereto attached, and promised this affiant at different times, that he would pay said note according to its tenor and effect; that after his repeated promises to pay said note and his failure to do so, said judgment was taken against him. The affidavit also states, that on two or three occasions after the closing of said bank, the appellant was at the house of the appellee and examined said note and stated, that it was his note; and at none of these said times the appellant claimed that said note had been altered in any manner, either as to the time when the same became due or as to the rate of interest payable per annum as set forth in the

note.

The Court, upon the consideration of appellant's affidavit setting forth his defense, and the counter affidavit of the appellee, overruled the motion to open the judgment; and this appeal is prosecuted from the order and judgment made.

The affidavit of the appellant and the facts stated therein concerning the alterations of the promissory note in question without any authority from the appellant, the maker of the same, constituted a material alteration of the instrument. It is well settled that, "when a negotiable instrument is materially altered, no recovery can be had thereon against anyone, who became a party thereto prior to the alteration, by any person into whose hands it has come since the alteration, even though he be a bona fide holder without notice." Keller vs. Rock Island State Bank, 292 Ill. 553. Pankey vs. Mitchell, Breese, 383. Burwell vs. Orr, 84 Ill. 465. Bank vs. Withus, 237 Ill. Ap. 217.

The counter affidavit and the facts therein alleged had a direct bearing upon the merits of the case, both as to appellee's right to the judgment recovered and the merits of the appellants's defense of a material alteration of the note in question. "Counter affidavits are not competent evidence to be considered by the Court to determine the merits of the matters of defense set up in an affidavit to open a judgment for leave to make a defense thereto; and should not have been considered by the Court in determining that question." Continental Construction Co. vs. Henderson County Pub. Serv. Co., 227 Ill. Ap. 43. Mutual Life of Ill. vs. Little, 227 Ill. Ap. 436. Crystal Lake Country Club vs. Scanlon, 264 Ill. Ap. 46. Dianne, et al. vs. Matzenbaugh, 49 Ill. Ap. 527. Murphy vs. Schoch, 135 Ill. Ap. 550. Hood vs. Gehrs, 170 Ill. Ap. 230.

Upon consideration of the facts constituting appellant's defense, the motion to open up the judgment should have been allowed; and the appellant should have been given leave to plead his defense;

and the denial of the motion was error. The judgment and order is therefore reversed and the cause remanded with directions to sustain the motion to open the judgment and give leave to the appellant to plead his defense.

Abstract
Abstracts - [illegible] furnished
Rem. No 18506

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269 I.A. 662

General No. ~~8740~~ 8506

JANUARY TERM, A. D. 1933

R. O. Ahlenius, Appellee,

vs.

Bunn & Humphreys, Inc., Appellant.

Appeal from Circuit Court, McLean County.

ELDREDGE, P. J.

On an appeal to this Court from the Court below the judgment of the Circuit Court was reversed and a judgment entered in this Court. (264 Ill. App. 177). The Supreme Court granted a **certiorari**, reversed the judgment of this Court and remanded the cause to this Court, "with directions either to affirm the judgment, or, if there was error in matter of law requiring a reversal and which error can be corrected on another trial, to remand the cause and order that the error be corrected, or if a final judgment is entered finding the facts different from the trial court, the ultimate facts found differently from the facts as found by the circuit court shall be incorporated in the judgment." Ahlenius vs. Bunn & Humphreys, 350 Ill. 46. Pursuant to the mandate of the Supreme Court, this Court makes the following findings of fact and orders the same to be incorporated in the judgment of this Court:—

(1) We find that R. O. Ahlenius was a stockholder in J. F. Humphreys & Co., a corporation, before and at the time of the consolidation of that corporation with John W. Bunn & Co., a corporation. (2) We find that as such stockholder of the corporation, J. F. Humphreys & Co., he objected to the consolidation of that corporation with the corporation, John W. Bunn & Co. (3) We find that the fair value of the shares of stock owned by R. O. Ahlenius at the time of said consolidation was $17,470.50. (4) We find that said corporations were consolidated September 21, 1928. (5) We find that the interest on said principal debt from September 21, 1928 to the time of the rendition of the former judgment in this Court at the rate of five per cent. per annum amounts to $2,673.50. (6) We find that the total damages due R. O. Ahlenius from Bunn & Humphreys, Inc. at the time of the rendition of the former judgment in this Court are $20,144.00.

It is ordered and adjudged by this Court that the judgment of the Circuit Court of McLean County be and the same is hereby reversed.

It is further ordered and adjudged by this Court that R. O. Ahlenius, petitioner, have and recover of and from Bunn & Humphreys, Inc., a corporation, respondent, the sum of Twenty

Thousand One Hundred Forty-four Dollars ($20,144.00) damages, together with his costs by him in this behalf expended and that execution issue therefor.

General No. 8627 Agenda No. 1

OCTOBER TERM, A. D. 1932

Yelloway Pioneer System, Inc., a Corporation,
Plaintiff in Error,

vs.

Emma C. Dean, Defendant in Error.

Writ of Error to Circuit Court, Logan County.

ELDREDGE, P. J.

Defendant in error, Emma C. Dean, hereinafter designated as plaintiff, recovered a judgment in the sum of $6,000.00 against plaintiff in error, Yelloway Pioneer System Inc., hereinafter designated as defendant, in an action on the case for damages resulting from personal injuries. On an appeal from a former judgment rendered in this case, the judgment was reversed by this Court for the reasons stated in our opinion. Dean vs. Yelloway Pioneer System Inc., 259 Ill. App. 180. The pleadings and facts as they then appeared are set out in the opinion, to which, reference is hereby made. The trial which resulted in the former judgment was had upon the theory that a motor bus company in maintaining on the premises of a gasoline station of a third party a depot and platform for passengers was bound to use the highest degree of care. The declaration charged and the jury were

instructed that that was the rule of law and we held that a common carrier in regard to the maintenance of its depot premises was bound to use only ordinary care. The evidence in the present record is substantially the same as it appeared on the other trial. The declaration was not amended in regard to the duty of the defendant in the respect mentioned, but the jury were instructed and the case was tried upon the theory as expressed in our former opinion, that it was the duty of the defendant to exercise ordinary care in the maintenance of its depot platform. It is now insisted that because the declaration was not amended the judgment should be reversed. While the declaration charged a higher duty on the part of the defendant than the law required, yet the jury were correctly instructed in regard thereto.

It appears that after the former judgment was reversed and remanded another trial was had wherein a verdict was rendered in favor of defendant, and on the plaintiff's motion to set aside that verdict and for a new trial the verdict was set aside and a new trial granted. Thereupon defendant made a motion for a change of venue from the Judge who presided at that trial which was overruled. That Judge, however, did not try the case in which the present judgment was rendered but called in another Judge who

presided therein. It is now assigned as error that the overruling of the motion for a change of venue by the Judge who granted the new trial was error and for this reason this judgment should be reversed. It is wholly immaterial insofar as the present judgment is concerned whether another Judge on another trial declined to grant a change of venue from himself.

It is assigned as error that the Court should have directed a verdict for the defendant. There was evidence introduced which fairly tended to show the negligence of defendant and the Court could not under such circumstances direct a verdict in its favor.

It is also contended that the Court erred in giving the first and second instructions offered on behalf of the plaintiff. These instructions set out the first and second counts in substance and while they might have been unnecessarily prolix, they each concluded with the averment that the instruction is given to inform the jury what the charges made in each count respectively by the plaintiff were **and for no other purpose.** We do not believe that under these circumstances it can be fairly said that any intelligent jury could have been misled or influenced against the defendant thereby. Criticisms are also made to some

of the other instructions given on behalf of the plaintiff which we have duly considered but are of the opinion that there are no errors therein of sufficient gravity to cause a reversal of the judgment.

The Court permitted a time table of defendant published in a newspaper, showing the time of the departure of its buses from its station where the accident happened to be admitted in evidence. The testimony shows that through an agreement with the agent of defendant the newspaper would publish this time table in consideration that defendant would carry the evening papers on its bus each evening to the City of Atlanta for delivery there. The objection to the introduction of this testimony is that the agent's authority for making this agreement and having the time table published was not proven. The evidence shows that defendant never repudiated the agreement or disavowed the publication of its time table but carried out the contract as made by its agent, thereby ratifying the same.

It is further objected that a witness was permitted to testify to the sprinkling of ashes upon the oil and grease where plaintiff slipped shortly after the accident and while the plaintiff was sitting in a chair to which she had been lifted

after she had slipped and fallen. This was competent evidence as tending to show the existence of the grease and oil on the platform at the time of the accident.

The injury occurred October 12, 1928. Plaintiff received a complete fracture of the left femur of the leg. The bones were shafted into each other, overriding the upper fragment. Her leg has been shortened from one and one-half to two and one-half inches. She is a heavy woman weighing in the neighborhood of 200 pounds. The injury is permanent and the evidence tends to show that she will never be able to walk without a crutch. Under these circumstances we cannot hold that the damages are excessive.

We find no reversible error in the record and the judgment of the Circuit Court is affirmed.

General No. 8669 Agenda No. 13

OCTOBER TERM, A. D. 1932

Willis Lyons, Appellee,

vs.

Moorman Manufacturing Company, a Corporation, Appellant.

Appeal from Circuit Court, Vermilion County.

ELDREDGE, P. J.

This case originated before a Justice of the Peace and upon a trial on appeal to the Circuit Court plaintiff recovered a verdict and judgment in the sum of $264.00.

The defendant manufactures a medicine for the purpose of eliminating worms from chickens, and in the summer of 1931 its agent and representative was operating among the farmers and other persons raising chickens in Vermilion County. On August 17 he wormed fifty-three old hens and 197 large Rhode Island Red pullets belonging to the plaintiff with a liquid worm expeller manufactured and sold by the defendant. He did not worm all of the plaintiff's chickens on that day for the reason that he ran out of medicine. He came back on August 19 and wormed the remainder of the chickens consisting of 151 mixed chickens and forty-nine pullets. Of those wormed on August 17, 150 of the pullets and thirty-nine of

the old hens died. Of those wormed on the 19th, seventy-six of the mixed chickens died. The evidence of the plaintiff tends to show that before the worming of the chickens, they were apparently in good health and first-class condition. It further tends to show that after the worm medicine was administered to the chickens they began to stagger around and fall over, and plaintiff remarked to the agent that he was killing his chickens and the latter replied he was giving them an extra big dose to kill the tape worms. Some of the chickens died a few hours after they were treated and others continued to die from time to time during the next four months. Two veterinarians held post-mortems on some of the chickens and testified in substance that they found the intestines and gizzards very much inflamed and seared or parched as if something had burned the linings thereof, some irritating substance, and in their opinions such condition was caused by some chemical irritant. They further testified that in case a chicken was poisoned with a drug in quantity sufficient to cause death the chicken might live several months from the time the medicine was administered before it died.

The defendant produced the witness Dr. Bratton, a veterinary surgeon, who testified that about the last of August or first

of September he went out to plaintiff's farm to look at the chickens and found that some of them looked very bad; they were drowsy and were sitting down and couldn't get out of the way; they would flop their wings and fall over and had a gripping position with their feet and seemed to be very much paralyzed in their limbs; that he killed one and held a post-mortem and found the liver enlarged and very dark in color, mushy; the intestinal tract was very much irritated and inflamed; the color of the head was very light and pale; the wattels were also pale and it had diarrhea. The witness then testified that on January 22, 1931 he experimented on fifty chickens with the worm expeller mixture and the test continued from January 18 to March 11; that there were three hens that were ailing when he received them and died while the rest got along all right. He was then asked on direct examination the following question:— "Q. State as to these three that died as to whether you were able to form an opinion as to the cause of the condition in which you found them?" The objection of the plaintiff to this question was sustained. He was then asked this question:— "Q. What was done with them at the end of the trial," and an objection of plaintiff was also sustained. It was not error to sustain these objections. These were not the chickens of plaintiff on which he experimented and the experiment was made months before the chickens of plaintiff

were treated and it was immaterial what his opinion was as to the cause of the condition of the three on which he experimented which died or what was done with them after the trial. This witness was asked the following hypothetical question:— "Q. I will ask you in view of the evidence you have heard in the case and the symptoms that you found in the condition of this one chicken you posted, and supposing that these chickens showed drowsiness, nervous condition of the head and partial paralysis, paleness about the head, loss of appetite and thirst, diarrhea and exhaustion and lapsed into unconsciousness before death, and suppose that the trouble continued to extend to the members of the flock for a period of about four months and that you found the intestine of the one you posted inflamed as you have stated, and found enlargement and softening of the liver, which was dark in color, state whether or not you are able to form an opinion as to the cause of the death of plaintiff's chickens," to which an objection was sustained. An expert witness cannot base his conclusions upon the evidence he had heard in the case. E. A. & S. Traction Co. vs. Wilson, 217 Ill. 47; Shaughnessy vs. Holt, 236 Ill. 485. Substantially the same question was asked of another veterinary surgeon, Dr. Crabtree, and an objection was sustained thereto which was proper. The defendant also introduced evidence by several witnesses who had had chickens treated allegedly with the same medicine to the effect that the chickens so treated survived the treatment and did not die. In rebuttal the plaintiff produced witnesses who testified that they had had their chickens treated with the same medicine and many of them died. This rebuttal evidence was objected to principally on the ground that it should have been introduced by plaintiff in making out his case in chief and was

not rebuttal evidence. There is no force to this contention.

It is also contended that there is no testimony in the record that plaintiff exercised due care for the health of the chickens after the treatment. The plaintiff testified that defendant's agent told him not to feed them the night before the treatment nor for about six hours thereafter and that he followed out these instructions. These were all the directions that were given to him with reference to the care of the chickens. The evidence does not show that otherwise than as stated any other particular care of the chickens was necessary. Under such circumstances, where the specific directions were complied with, the defendant cannot complain that the plaintiff should have done something else in regard to the care of the chickens which he knew nothing about.

There is some criticism made to the instructions of which two were given for the plaintiff and fifteen for the defendant and seven more offered by the defendant were refused. We have examined these instructions and in our opinion there was no reversible error committed by the Court in passing thereon.

The judgment of the Circuit Court is affirmed.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE

APPELLATE COURT OF ILLINOIS

Second District

October Term A. D. 1931

General No. 8384 Agenda 10

LEAH LIEBMAN,

Defendant in Error,

-VS-

CHARLES RAHM, et al,

Plaintiffs in Error.

Error to the Circuit Court of Will County.

Jett, J.

Prior to June 26, 1925, Herman Scheer and Louisa Rahm were the owners of a farm containing approximately two hundred twenty-two acres in Will County, Illinois. On that day these parties, together with their respective spouses, executed and delivered to Gustav Buchheit a deed intrust to the premises, which was properly acknowledged and duly recorded on July 30, 1925, appearing of record in the Recorder's office of Will County in Book 617 at page 259. On the same day the said Gustav Buchheit, trustee, executed, in triplicate, a trust agreement, one of which was delivered to Mrs. Rahm, one to Mr. and Mrs. Scheer and one was retained by Mr. Buchheit, but this instrument was never recorded.

On February 4, 1927, the Circuit Court of Will County, in a proceeding in which all of theinterested parties were properly in court, rendered a decree finding that Fred L. Hasenjaeger was the owner in fee of an undivided one-half interest in the premises, and that Louisa Rahm and Herman Scheer had the equitable title to the remaining undivided one-half, "subject however to the right of the defendant Gustav Buchheit, as accuired in and by a

deed in trust recorded in the Recorder's office of Will County, Illinois, in Book 617 on page 259, wherein said Gustav Buchheit holds said premises with the appurtenances thereto, upon the trust and for the purposes and uses therein set forth and none others."

With the title in this condition, Gustav Buchheit applied to A. J. Liebman, a mortgage broker and husband of the defendant in error (complainant below) for a loan, stating that he was in a hurry and that it was worth something to him if he could get the money quickly. Liebman made no inquiry as to what Buchheit was going to do with the money, but charged him $200.00 commission for negotiating the loan and gave him a check for $1300.00 and received from Buchheit a note for $1500.00 due 60 days after date, executed by Buchheit as trustee and payable to the order of Leah Liebman and secured by a deed of trust in the usual form upon the two hundred twenty-two acre tract. This note and trust deed are dated April 6, 1927. On May 26, 1927, Buchheit again came to Liebman and procured an additional loan for $500.00 and executed a note as trustee for that sum, payable in fifteen days after date and securing the payment of the same by another trust deed in the usual form upon the same property. In exchange therefor Liebman gave Buchheit a check for $500.00, payable to himself individually. On June 13, 1927, after both of these notes were past due, Buchheit again came to Liebman and sought an additional loan, and at this time Buchheit, as trustee, executed a note for $3,000.00 due in 90 days, and secured the payment of the same with a new trust deed conveying the same tract of real estate. In exchange for this new note and mortgage Liebman gave Buchheit a check for $675.75. The two former notes and trust deeds were not at this time returned to Buchheit, nor were they released of record.

Subsequently complainant filed her bill of complaint to foreclose this last trust deed. The defendants answered,

admitting the ownership of the property as alleged in the bill, and the execution of the conveyance to Gustav Buchheit of the premises covered by the instrument sought to be foreclosed, alleging that under the conveyance to Buchheit he became seized of the legal title to the premises, with certain powers only, and denied that he had the right or power thereunder to sell or mortgage the premises, except to improve or subdivide the same; that complainant, in dealing with Buchheit, was not relieved from seeing to the application of any funds loaned on said premises, and that at the time the laans were made, Buchheit was no longer acting as trustee under the terms of the deed of trust; that at the time the $3,000.00 note and trust deed were executed, Buchheit was individually indebted to the complainant in said sum and was planning to defraud the defendants and executed the same for his own personal indebtedness, all of which was known to complainant; that the defendants reposed confidence in Buchheit, who was a lawyer and he enticed defendants to execute the deed of trust to him, his purpose being to raise money for his own use and benefit; that A. J. Liebman, at the time the loans were made, knew Buchheit was a dishonest man and had previously been guilty of malconduct with the property of others, which he held in trust, and that complainant and Buchheit conspired to impose upon the property of defendants liens created by the several trust deeds, well knowing that Buchheit intended to use the money borrowed for his own use and benefit. Replications were filed and a hearing had before the chancellor who entered a decree of foreclosure and sale, and the case is here for review upon a writ of error.

The evidence failed to support the allegations of the answer as to any actual fraud or the existence of a conspiracy between Buchheit, A. J. Liebman or the complainant. The facts that

Buchheit agreed to pay excessive commissions in order to obtain the loans, that Buchheit was always in a hurry to obtain the money, that Liebman made the checks payable to Buchhiet, individually and not as trustee, that Liebman did not ask Buchheit what he was going to do with the money or make any inquiry of the parties in possession or surrender the previously executed notes and trust deeds when the last ones were executed do not, in our opinion, in view of the provisions of the conveyance under which Buchheit received title, constitute such a series of incidents which, taken together, irresistably point to such fraud on the part of the trustee, and A. J. Liebman as would invalidate the mortgage sought to be foreclosed.

By the conveyance, the provisions of which are determinative of the rights of the parties hereto, the owners of the premises involved in this proceeding, on June 26, 1925, conveyed them to Gustav Buchheit of Chicago, Illinois, as trustee, under the provisions of a trust agreement, dated June 26, 1925, and known as trust Number R-13672. This conveyance, after describing the property, then provided, viz:

> "TO HAVE AND TO HOLD the said premises, with the appurtenances upon the trusts and for the uses and purposes herein set forth; Full power and authority is hereby granted to said trustee to improve, manage, protect, and sub-divide said premises or any part thereof, to dedicate parks, streets, highways, and alleys, and to vacate any subdivision or part thereof, and to resubdivide said property, as often as desired, to contract to sell, to sell on any terms, to convey either with or without consideration, to donate, to dedicate, to mortgage, pledge, or otherwise encumber; to lease, to partition, to exchange or to subject said property or any part thereof, for other real or personal property, to grant easements or charges of any kind, to release, convey or assign any right, title or interest in or about said premises and to deal with said property and every part thereof in all other ways and for such other consideration as it would be lawful for any person owning the same to deal with the same, whether similar to or different from ways above specified, at any time or times hereafter.

Boardman agreed to pay excessive commissions in order to obtain the loans, that Boardman was always in a hurry to obtain the money, that Hickman made the checks payable to Boardman, initially and not as trustee, that Hickman did not ask Boardman what he was going to do with the money or make any inquiry of the position in possession or surrender the mortgaged encumbrances and trust deeds when the last dues were exhausted do not, in our opinion, in view of the provisions of the conveyance under which Hickman received title, constitute such a series of incidents as, taken together, invariably point to such fraud on the part of the trustee, and A. J. Hickman as would invalidate the mortgage sought to be foreclosed.

By the conveyance, the provisions of which are determinative of the rights of the parties hereto, the owners of the premises involved in this proceeding, on June 26, 1925, conveyed them to Chester Boardman of Chicago, Illinois, as trustee, under the provisions of a trust agreement, dated June 26, 1925, and recorded in Cook County, Illinois. The conveyance, after describing the property, then provided, viz:

> "TO HAVE AND TO HOLD the said premises, with the appurtenances upon the trusts and for the uses and purposes herein and therein set forth; full power and authority is hereby granted to said trustee to improve, manage, protect, and subdivide said premises or any part thereof, to dedicate parks, streets, highways, and alleys, and to vacate any subdivision or part thereof, and to resubdivide said property, as often as desired, to contract to sell, to sell on any terms, to convey either with or without consideration, to lease, to mortgage, pledge, or otherwise encumber, to lease, to partition, to exchange or to confer said property or any part thereof, for other real or personal property, to grant easements or charges of any kind, to release, convey or assign any right, title or interest in or about said premises and to deal with said property and every part thereof in all other ways and for such other consideration as it would be lawful for any person owning the same to deal with the same, whether similar to or different from the ways above specified, at any time or times hereafter.

"In no case shall any party to whom said premises, or any part thereof, shall be conveyed, contracted to be sold, leased, or mortgaged by said trustee, and in no case shall any party dealing with said trustee in relation to said premises, be obliged to see to the application of any purchase money, rent, or money borrowed or advanced on said premises, or be obliged to see that the terms of this trust have been complied with, or be obliged to inquiry into the necessity or expediency of any act of said trustee, or be privileged or obliged to inquire into any of the ~~tmers~~ terms of said trust agreement.

"The interest of each and every beneficiary hereunder and of all persons claiming under them, is hereby declared to be personal property and to be in the earnings, avails, and proceeds arising from the disposition of the premises; the intention hereof being to vest in the said Gustav Buchheit, as Trustee, the entire legal and equitable title in fee in and to all of the premises above described."

The trust agreement mentioned in this conveyance as bearing Trust Number N-13678 was also dated June 26, 1925, but never recorded. The conveyance conferred upon Buchheit the broadest of powers. It expressly granted to him the authority to mortgage the premises or convey any right, title or interest therein, and to deal therewith as it would be lawful for any person owning the same to deal with the same, and both it and the said trust agreement No. N-13678, provide that in no case should any party to whom said premises should be conveyed or mortgaged by the trustee be obliged to see to the application of the money borrowed or obliged to see that the terms of the trust have been complied with or obliged to inquire into the necessity or expediency of any act of the trustee, the intention being, as expressed in said instruments, to vest in Buchheit the entire legal and equitable title in fee in said premises, each instrument reciting that the interest of the beneficiaries is in the proceeds arising from the disposition of the land and declaring such interest to be personal property.

In our opinion, by the express terms of this conveyance defendant in error was relieved from any duty to make the inquiries which plaintiffs in error insist should have been made, and the

case of The Union Mutual Life Insurance Company v. Spaids, 99 Ill. 249, so strongly relied upon by plaintiffs in error, does not announce any rule to the contrary. In the Spaids case it appeared that the owner of certain real estate conveyed the same to Talmade E. Spaids to hold in trust for certain named minor children. The trust deed provided that the trustee should have full power and ample authority to do any and all things with said property which he might do if the property were vested in him absolutely, and it appeared from the evidence that the trustee procured a loan and executed a mortgage to secure its payment, and used the proceeds of the loan in his own business. In a bill to foreclose the mortgage so executed, the court held that the complainant was not entitled to relief inasmuch as the complainant had notice of the fact that the trustee was going to use the proceeds of the loan for his own private benefit and that the trustee subsequently did so.

We have examined this record with care. The chancellor refused to include in the decree any sum which Buchheit had agreed to pay as commission to Liebman for procuring the loans. Plaintiffs in error may have been unfortunate in selecting Buchheit and clothing him with such broad powers, and while Buchheit may have mis-applied the proceeds, the blame for it all must rest upon those who executed the trust conveyance. We conclude that the decree of the Circuit Court should be affirmed, which is accordingly done.

DECREE AFFIRMED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(65027—1M—9-31) 7

8557

AT A TERM OF THE APPELLATE COURT,

93

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8557 A. 23

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM A. D. 1932.

LENA A. GRAY, Administratrix of the Estate of Lee Roy Gray, Deceased, (Appellee)

vs.

PEORIA BUS & BAGGAGE LINE, (A Corporation) (Appellant)

Appeal from Circuit Court of Peoria County.

Baldwin, J.

* * * * * * * *

This is an appeal from the judgment of $5,790.00 entered in the Circuit Court of Peoria County in favor of Appellee, as administratrix of the estate of Lee Roy Gray, deceased, against the Peoria Bus and Baggage Line, Appellant. The judgment was entered July 1, 1932.

Suit was brought by appellee against appellant to recover damages by reason of the alleged wrongful death of appellee's intestate, Lee Roy Gray, which occurred on Easter morning, May 4th, 1930 between 6:00 and 6:30 A. M. in the City of Peoria.

The declaration consisted of four counts, the first count charged general negligence, the second and third counts are similar and charged the appellant with driving the taxi at an unreasonable rate of speed. The second count charges

IN THE

SUPREME COURT OF NEW ZEALAND

Wellington District

COURTHOUSE TOWN A. D. 1932.

BETWEEN J. GUNN, Administratrix of the Estate of Lee Roy Gunn, Deceased, Appellant	
vs.	of Tonga's Trusty,
THE QUEEN ON A CERTAIN LIFE, In the question (Respondent)	

Before J.

* * * * * * *

This is an appeal from the judgment of [illegible] entered in the Supreme Court of Tonga's Trusty in Appellant, as administratrix of the estate of Lee Roy Gunn, deceased, against the Respondent [illegible]. The judgment was entered July 1, 1930.

Suit was brought in respective against [illegible] recovery damages by reason of the alleged wrongful death of [illegible] Appellant's intestate, Lee Roy Gunn, while [illegible] working, May 4th, 1930 between 8:00 and 9:00 A. M. in the City of Tonga.

The indictment consisted of four counts, the first count charged general negligence, the second and third counts are similar and charged the [illegible] the last of unnecessarily [illegible] dead. The [illegible]

the Bus Company directly in driving the taxi or bus and the third count charges the taxi as being driven by and through its agent at a high and dangerous rate of speed. The fourth count is substantially the same as the first three, with the exception that Section 17 of the City Ordinance of the City of Peoria is set out, which section provides for the regulation of traffic on certain "through" streets in the City, included in which was South Jefferson Avenue where it is intersected by Liberty Street at which intersection the accident occurred and the Ordinance purports to declare as to what vehicle shall have the right of way while traveling on such streets at this particular intersection. The deceased was riding on his motorcycle south on the westerly side of South Jefferson Avenue towards the intersection of Liberty Street. Jefferson Avenue at this point is 60 feet wide from curb to curb and runs northerly and southerly. Liberty Street, where it intersects South Jefferson Avenue runs east and west and is a direct route from the Rock Island Railroad Depot to the Jefferson Hotel, which is situated on the north-west ~~si~~ corner of Jefferson and Liberty. Section 17 of the Ordinance of Peoria provides that vehicles traveling on South Jefferson Avenue shall have the right of way over other vehicles crossing this Street and any person or corporation operating any vehicle on the Street intersection in question, shall bring the vehicle to a full stop before entering or crossing Jefferson Avenue and such vehicle shall not have the right of way until it proceeds after making such stop. There is a double line of street railway tracks on South Jefferson Avenue and the west rail of the westerly track is 23 and 15/100 feet from the west curb of Jefferson Avenue. The evidence is in sharp conflict as to just where the accident occurred, but it seems from the best considered evidence that the rear wheels of the taxi had cleared

the Bus Company directly in driving the taxi at the time and the third count charges the taxi as being driven by and through its agent at a high and dangerous rate of speed. The fourth count is substantially the same as the first three, with the exception that Section 17 of the City Ordinance of the City of Peoria is set out, which section provides for the regulation of traffic on certain "through" streets in the City, included in which was South Jefferson Avenue where it is intersected by Liberty Street at which intersection the accident occurred and the Ordinance purports to declare as to what vehicle shall have the right of way while traveling on such streets at this particular intersection. The deceased was riding on his motorcycle south on the westerly side of South Jefferson Avenue towards the intersection of Liberty Street. Jefferson Avenue at this point is 80 feet wide from curb to curb and runs northerly and southerly. Liberty Street, where it intersects South Jefferson, runs east and west and is a direct route from the Rock Island Railroad Depot to the Jefferson Hotel, which is situated on the north-west ki corner of Jefferson and Liberty. Section 17 of the Ordinance of Peoria provides that vehicles traveling on South Jefferson Avenue shall have the right of way over vehicles approaching this Street and any person or corporation operating any vehicle on the street intersection in question, shall having the vehicle to a full stop before entering or crossing Jefferson Avenue and such vehicle shall not have the right of way until it proceeds after making such stop. There is a double line of street railway tracks on South Jefferson Avenue and the west rail of the westerly track is 31 and 12/10ths feet from the west curb of Jefferson Avenue. The evidence is to show conflicting as to just where the accident occurred, but is agreed from the last considered evidence that the rear wheels of the taxi had cleared

the west rail of the street railway tracks before the impact occurred. There seems to be no conflict in the testimony as to the rate of speed the deceased was driving his motorcycle south on Jefferson Avenue and that evidence discloses that he was driving his motorcycle at the rate of 40 or 50 miles an hour. There is no evidence in the record as to what the deceased did, if anything, to avoid the accident at the time or just before his motorcycle came in contact with the front end of the taxi, which was 16 feet long, so that from the best estimate that can be made, the impact occurred within 5 or 6 feet of the west curb of Jefferson Avenue, extended through Liberty Street. There is a conflict in the evidence as to the rate of speed at which the taxi was proceeding. It seems that two taxis of the appellant's were down at the Rock Island Depot soliciting passengers, but did not secure any and they proceeded from the Rock Island Depot to the Jefferson Hotel by the way of Liberty Street. A witness who was getting off of the street car at the intersection of Adams and Liberty one block east of where the fatal accident occurred, testified that she saw the two taxi cabs proceeding west as they crossed Adams Street and that they were going twenty-five or thirty miles an hour. Then a bus driver who claimed to be on the south side of Liberty Street and Jefferson stopping his bus to let the taxi cabs go by testified that the rate of speed was approximately thirty or thirty-five miles an hour as they went across Jefferson and Adams. The two taxi cabs proceeded west on Liberty, one approximately ten feet ahead of the other and the respective drivers of these two cabs testified that they were proceeding up Liberty Street at about fifteen or twenty miles an hour. That when they came to the east side of Jefferson Avenue at Liberty, the taxi cab that was in front came to a full stop and the other taxi cab came up behind and then turned to the left and came up along side of the other taxi, stopped and then

this latter car stopped and proceeded across Jefferson Avenue in second gear at about ten miles an hour. Both taxi drivers testified that they did not see the motorcycle approaching until it was within about 100 feet of the intersection and the driver of the taxi with which the motorcycle collided, stated that his rear wheels were on the third rail from the east as he was proceeding west when he first saw the motorcycle and he swerved his car a little to the south to try to avoid the collision which seemed imminent. There was some testimony which suggested at the fact that the two taxis as they proceeded west on Liberty were racing, but this was denied by the taxi drivers.

As a result of the accident, the appellee's intestate was thrown in the air and coming down hit the taxi cab and then fell to the pavement, receiving severe injuries as a result of which later on in the afternoon he died.

Appellee contends that the court in refusing to instruct the jury to find the defendant not guilty at the close of plaintiff's evidence and at the close of all the evidence, committed error; that the verdict was against the manifest weight of the evidence; that the court erred in giving the right of way instruction above referred to; that there is no evidence in the record intending to show that defendant was guilty of negligence as charged and finally that the verdict was not based on the evidence, but prejudice and sympathy; conduct and remarks of counsel for appellee during the trial in argument intending to accentuate prejudice.

The contentions of the appellant with reference to the court refusing to instruct the jury to find the defendant not guilty; that the verdict of the jury was against the manifest weight of the evidence and that there is no evidence intending to show defendant guilty of negligence as charged, may all be considered together. There were a few eye witnesses to the

this latter car stopped and proceeded across defendants lanes in second gear at about ten miles an hour. Both taxi drivers testified that they did not see the motorcycle approaching until it was within about ten feet of the intersection and the driver of the taxi did avoid the motorcycle collision, which had the rear wheels and on the front fell from the seat of the motorcycle and the driver of the taxi was injured in the collision and he was a little to the south to try to avoid the collision which caused injuries. There was some testimony which suggested at the time that the two taxis as they proceeded west on Liberty were racing, but this was denied by the taxi drivers.

As a result of the accident, the appellee's intestate was thrown in the air and coming down hit the taxi cab and then fell to the pavement, receiving severe injuries as a result of which later on in the afternoon he died.

Appellee contends that the court in refusing to instruct the jury to find the defendant negligently at the close of plaintiff's evidence and at the close of all the evidence, committed error; that the verdict was against the manifest weight of the evidence; that the court erred in giving the eight of way instruction above referred to; that there is no evidence in the record indicating to show that defendant was guilty of negligence as charged and finally that the verdict was not based on the evidence, but prejudice and sympathy; conduct and remarks of counsel for appellee during the trial is prejudicial in an aggregate reversible.

The contentions of the appellant with reference to the court refusing to instruct the jury to find the defendant not guilty, that the verdict of the jury was against the manifest weight of the evidence and that there is no evidence tending to show defendant guilty of negligence as charged, may all be considered together. There were a few eye witnesses to the

accident, five for the appellee and perhaps three of them stated that the taxi cab did not stop before entering the intersection. This was denied positively by the two taxi drivers,as has been related above. This was a controverted question and very properly was one for the jury to decide, and the court was correct in so doing, in our judgment. The more serious question under this heading to be considered is whether there was any proof of due care of the deceased for his own safety and whether or not he was guilty of contributory negligence, which contributed to his death and could he have avoided the accident if he had been keeping a proper lookout for danger ahead. The day was clear and bright, the street was wide, deceased was driving his motorcycle down the street at a rate of speed of about forty or fifty miles per hour. Assuming it was at forty miles an hour, this means 3,520 feet in a minute and approximately 60 feet each second. There is absolutely no evidence in the record as to where he was looking or what he was doing, except driving his motorcycle at the rate of speed above stated. It is indeed a question of great moment as to whether or not, as he came down the street, he was observing the rules, which would prompt a reasonable person under such circumstances, for his own safety and for the safety of others who may be upon the street at and just before the impact with the taxi which caused his death. It is a very close question and one which we believe under all the circumstances of the case, the court in exercise of its judgment might have properly left for the jury to decide. The same may be said with reference to whether or not appellant was guilty of the negligence charged in the declaration, that is, of driving the car at an unreasonable rate of speed and in not stopping at the intersection before proceeding across Jefferson Avenue. The evidence upon these questions was ~~xxxxxxxx~~ conflicting, an

accident, five for the complaint and twenty three of them stated that the taxi cab did not stop before entering the intersection. This was denied positively by the two taxi drivers, as has been stated above. This was a [illegible] question [illegible] ly was one for the jury to decide, and the court was correct in so doing, in our judgment. The more serious question under this heading to be considered is whether there was any proof of the care of the deceased for his own safety and whether or not he was guilty of contributory negligence, which contributed to his death and could be have avoided the accident if he had been [illegible] and bright, the street was wide, deceased was driving his motorcycle down the street at a rate of speed of about forty or fifty miles per hour. Assuming it was at forty miles an hour, this means 5,520 feet in a minute and approximately 90 feet each second. There is absolutely no evidence in the record as to where he was looking or what he was doing, except driving his motorcycle at the rate of speed above stated. It is indeed a question of great moment as to whether or not, as he came down the street, he was observing the rules, which would prompt a reasonable [illegible] the impact with the taxi which caused his death. It is a very close question and one which we believe under all the circumstances of the case, the court in exercise of its judgment might [illegible] rectly left the jury to decide. The same may be said with reference to whether or not complaint was guilty of the negligence charged in the declaration, that is, of driving the car at an unreasonable rate of speed and in not sounding the horn in the intersection before proceeding across Jefferson Avenue. The evidence upon these questions was exceedingly conflicting, as

accident like this happens almost instantaneous and it is not at all unusual for there to be a difference of opinion as to even eye witnesses as to just what occured at and immediately before such an accident occurred. The writer of this opinion, together with his associates, may be of one opinion as to whether or not due care was exercised by deceased, or that negligence, as charged, was committed by appellant and the first half dozen readers of this opinion may come to a different conclusion, all honest in an effort to get at the truth of the situation, therefore, in our judgment these were questions upon which honest minds may differ and for this purpose the wise provisions of the law provides that juries of 12 men selected to try cases shall be called upon to decide such controverted questions and in our judgment, the court did not err in refusing to preemptorily instruct the jury to find the defendant not guilty and by the same token, at the conclusion of the evidence, leaving with the jury the question of due care and charged negligence of appellant for decision.

Error assigned in this case that appellee's counsel in the closing argument made certain alleged inflammatory statements which entered into the amount of the verdict, as a result of prejudice and passion aroused thereby. Statements of appellee's counsel in the closing argument were as follows: --

> "The taxi cab violated the right of way and the Statute law."

which was objected to and the objection sustained and appellee's counsel withdrew the remark and asked the court to disregard the statement as made and the court instructed the jury to that effect at the time. Again Appellee's counsel said: --

> "Everybody knows that taxi cabs, especially 'yellows' goes fast."

The taxi cabs in question it should be noted were "yellows" and this was objected to and the objection sustained. Appellee's

accident like this happens almost instantaneous and it is not at all unusual for there to be a difference of opinion as to even eye witnesses as to just what occurred at and immediately before the accident occurred. The system of trial evidence, important and necessary, may be of use relative to a dispute as to the facts are established by witnesses, or in fact conflicting, as should, as in this matter, one case to a different conclusion, all based in an effort to get at the truth of the situation. Therefore, in our judgment there are conditions which should exist when one differ and for this purpose the wise provisions of the law provides that juries of 12 men selected to try cases shall be called upon to decide such controverted questions and in our judgment, the court did not err in refusing to peremptorily instruct the jury to find the defendant not guilty and by the same token, at the conclusion of the evidence, leaving with the jury the question of due care and charged negligence of appellant for decision.

Error assigned in this case that appellee's counsel in the closing argument made certain alleged inflammatory statements which entered into the mount of the verdict, as a result of prejudice and passion argued thereby. Statements of appellee's counsel in the closing argument were as follows: —

"The test cab violated the right of way and the Statute law."

Which was objected to and the objection sustained and appellee's counsel withdrew the remark and asked the court to disregard the statement as made and the court instructed the jury to that effect at the time. Again appellee's counsel said: —

"Everybody knows this test cabs, especially 'yellows' pose test."

The test cabs in question it should be noted were "yellows" and same was objected to and the objection sustained. Appellee's

counsel again said: --

> "The jury should disregard testimony of this kind (meaning the taxi-cab drivers)".

that was objected to and the objection sustained. Again he said: --

> "It was the duty of the Peoria Bus and Baggage Line (appellant) not to kill Lee Roy Gray."

This was objected to and the objection was sustained by the court. As has been noted above, we regard this as a close case on the questions of fact, it being a death case; a mother as complainant and a corporation as defendant and to our minds unusual care should be observed by the court and counsel to see that only fair testimony is offered, and but clear and all prejudicial statements intending to inflame the minds of the jury and arouse their passions and prejudice should be avoided. From the record we would say unhesitatingly that the court did all in its power to prevent such remarks being made and by its instruction to the jury attempted to eradicate from their minds, so far as human agencies can, any improper impression as to the character of their verdict in the case; but as much can not be said for counsel for appellee - he knew the gravity of the situation, the sharp conflict of evidence, the relationship and character of the parties and the tendency of human sympathy creeping in almost unawares upon the slightest provocation in the trial of such a cause and should be more than ever on guard as to any questionable language used in the presentation of an argument, especially at the close of such a trial. Under the circumstances of this case it is our opinion that these remarks in this particular case were inflammatory and intended to inflame theminds of the jurors and to detract from their plain duty in being fair and impartial instrumentalities for the promotion of justice and it is difficult to estimate in a case such as this just what potency it had in bringing about the verdict. If there had been a clear preponderance of evidence on the facts

Again said: --

> "The jury should disregard testimony of this kind (meaning the hard-core drivers)".

that was objected to and the objection sustained. Again he said: --

> "It was the duty of the People Ms and Pacific Line (appellant) not to kill Lee Ray Ray."

This was objected to and the objection was sustained by the court. As has been noted above, we regard this as a close case on the question of fact, it being a death case; a worker as complainant and a corporation as defendant and to our minds unusual care should be observed by the court and counsel to see that only fair testimony is offered, and but clear and all prejudicial statements tending to inflame the minds of the jury and arouse their sensitive and prejudice should be avoided. From the record we think it unmistakingly that the court did all in its power to prevent such remarks being made and by its instruction to the jury attempted to eradicate from their minds, as far as human agencies can, any improper impression as to the character of their verdict in the case; but as much can not be said for counsel for appellee - he knew the gravity of the situation, the close conflict of evidence, the relationship and character of the parties and the tendency of such remarks [illegible] provocation in the trial of such a cause and should be more than [illegible] to say unmentionable language used in the presentation of an argument, especially at the close of such a trial. Under the circumstances of this case it is our opinion that these remarks in this particular case were inflammatory and intended to inflame tremendous of the jurors and to distract from their plain duty in fair and impartial instrumentalities for the consideration of justice and it is difficult to estimate in a case such as this just what potency it had in bringing about the verdict. If there had been a clear preponderance of evidence on the facts

in this case in favor of appellee, we would not feel inclined to reverse the case on these remarks alone, but because of the situation as presented by this record we feel that the remarks complained of had an effect upon the minds of the jury which no court or other known means of the law could counteract.

The most serious question arising for determination in this case is the one with reference to the instruction concerning the Ordinance of the City of Peoria, that was given in an instruction by the court. That instruction is as follows: --

"You are further instructed by the Court that at time of the accident in question in this case, the Ordinances of the City of Peoria relating to vehicular traffic on the public streets in the City of Peoria contained the following the same being Section 17 thereof:

"For the purpose of regulating traffic thereon, and to prevent collisions of vehicles, and injury to pedestrians and others, the portions, of the streets herein named from point to point, as indicated, shall be and they are hereby designated as "Through Traffic Streets," whereupon the vehicles using same, shall have the right of way over other vehicles crossing on other streets, such portions or designated streets being as follows, to-wit:

"Jefferson Avenue from the westerly line of Van Buren Street to the easterly line of Franklin Street and from the westerly line of Franklin Street, to the northerly line of First Avenue, and from the southerly line of First Avenue to the easterly line of State Street and from the westerly line of State Street to the easterly line of Persimmon Street and from the westerly line of Persimmon Street to the northerly line of Lincoln Avenue."

"Any person or corporation, operating any vehicle on any street intersection of the said "Through Traffic Streets or Avenues" shall bring such vehicle to a full stop before entering or crossing such "Through Traffic Streets or Avenues" and such vehicles shall not have the right of way until it proceeds after making such stop."

What has been said heretofore with reference to the inflammatory remarks of counsel applies equally true to the giving of instructions wherer there is a decided conflict of evidence and where passion and prejudice may easily arise in the conduct of a trial.

More than usual care should be exercised in seeing to it that the jury is correctly instructed as to the law bearing upon the facts of the case. The instruction above set out, to the giving of which error is assigned, purported to set forth certain reasons for the enactment of such an ordinance, to-wit: -- "For the pur ose of regulating traffic thereon and prevent collision of vehicles and injury to pedestrians, etc." In our judgment it was not proper to tell the jury in an instruction the reasons for the enactment of the Ordinance because such reasons may not apply to the facts in the particular case and whatever reasons may have impelled the enactment of the particular ordinance in question are not material, at least, it would not be proper to suggest them to the jury in this formal way without material evidence in support thereof. Then, too, the instruction containing the Ordinance was improper in that it did not qualify this assertion of the right of way regardless of circumstances, distance or speed, and without such qualifications our courts have held that similar instructions given was error. Muns vs. Chicago City Ry. Co. 235 Ill. 160; Heidler Hardwood Lumber Co. vs Wilson and Bennett Mfg. Co., 234 Illinois Appellate 89; Reidel vs Mansager 254 Illinois Appellate 68.

For the reasons assigned, this cause will be reversed and the case remanded for a new trial.

REVERSED AND REMANDED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(65027—1M—9-31) 7

8569

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.
Hon. JAMES S. BALDWIN, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

269 I.A. 661

BE IT REMEMBERED, that afterwards, to-wit: On FEB 28 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8569 Agenda No. 41

In the

APPELLATE COURT OF ILLINOIS

Second District

OCTOBER TERM A. D. 1932.

Esther Whipple,
(Plaintiff) Appellee,

vs

United States Fidelity and
Guaranty Company,
(Defendant) Appellant.

Appeal from the
Circuit Court of
Lake County.

BALDWIN, J.

This is a suit brought by appellee (plaintiff in trial court) against the appellant (defendant in trial court) to recover on a certain policy of insurance issued by the said appellant to the appellee.

The substantial facts in the case are that the appellee and her sister, one Claire Vickerman, had been in Florida and were returning in appellee's car to their home in or near Chicago, This car was being driven by the appellee and a short distance from Kenton, Ohio, an accident occurred in which the said Claire Vickerman was injured. Thereafter, the said Claire Vickerman, sister of appellee, brought suit

against the appellee for damages alleged to have been received in such automobile accident and thereafter a judgment in favor of said Claire Vickerman was entered against the appellee for the sum of $1,651.00

Execution was issued on such judgment and ultimately returned "unsatisfied." The appellee then filed this suit against the appellant in the Circuit Court of Lake County to recover the amount of such judgment, together with interest.

The appellant defended this proceeding upon the ground that one of the terms of the policy issued to the appellee provided that the insured should co-operate with the company in all matters in regard to a suit upon the policy and further upon the ground that the appellee assumed responsibility for the liability on her part and that there was collusion between the said appellee and her said sister in suchformer suit to enable the said Claire Vickerman, sister of appellee, to obtain such judgment against appellee for damages and to use such judgment to endeavor to hold the insurance company liable for the amount thereof.

From the evidence submitted we have been unable to find justification in the contention of appellant that the appellee assumed the liability in the accident and we therefore find that there was no error in the ruling of the court in the exclusion of this question from the consideration of the jury.

From the evidence it appears that the insurance company defended the former suit for and on behalf ofthe appellee but the evidence is very conflicting in regard to what statements the appellee made to the attorneys for the appellant about the accident and as to what she would swear to if she took the witness stand.

against the appellee the damages alleged to have been received in such automobile accident and therefore judgment in favor of said Gladys Vickerman was entered against the appellee for the sum of $1,[illegible].00

Execution was issued on such judgment and within thirty [illegible] against the appellant in the Circuit Court of Lake County to recover the amount of such judgment, together with interest.

The appellant defended this proceeding upon the ground that one of the terms of the policy issued to the appellee provided that the insured should co-operate with the company in all matters in regard to a suit upon the policy and further the ground that the appellee assumed responsibility for the liability on her part and that there was collusion between the said appellee and her said sister in undertaking suit to enable the said Gladys Vickerman, sister of appellee, to obtain such judgment against appellee for damages and to use such judgment to endeavor to hold the insurance company liable for the amount thereof.

From the evidence submitted we have been unable to find justification in the contention of appellant that the appellee assumed the liability to the accident and we therefore find that there was no [illegible] in the action of the sister in her [illegible] of this proceeding that [illegible] of the [illegible].

From the evidence in record [illegible] the former suit for and on behalf of the appellee but the evidence is very [illegible] to which [illegible] the appellee made to the attorney for the appellant [illegible] appellant not as to what she would [illegible] if she knew the sister stand.

The evidence is also conflicting as to the attitude assumed by the appellee at the time of the trial. These are purely questions of fact and this court and other courts of this State have repeatedly held that questions of fact are exclusive questions for the jury. The jury is composed of citizens, who are called from the body of the people for the purpose of assisting in the trial. Upon these jurors, acting as a part of the court, is placed the responsibility of reconciling the conflict in the testimony and to determine upon which side lies the preponderance or greater weight. (Chicago City Ry. Co. vs Bohnow 108 Ill. App. 346; Shevalier vs Seager 121 Ill. 564; Illinois Central Railway Co. vs Gillis 68 Ill. 317).

In Lowry vs Orr, I Gilm. 83 the court said: "Where the verdict depends upon the credibility of the witnesses, it is the peculiar province of the jury to judge that credibility and to attach such weight to the testimony of each as may seem to be proper, after a due consideration of all the circumstances arising in the particular case."

In this case the determination of these questions should have been submitted to the jury for its consideration and determination as to whether the appellee had violated the terms of the insurance policy by lack of co-operation in defending the suit. By directing a verdict in this case the trial court erred in assuming the determination of controverted questions of fact.

For the reasons stated herein the judgment of the Circuit Court of Lake County is reversed and this cause remanded for another trial.

REVERSED AND REMANDED.

The evidence is also conflicting as to the attitude assumed by the appellee at the time of the trial. There are merely questions of fact and this court and other courts of this State have repeatedly held that questions of fact are exclusive question for the jury. The jury is composed of citizens, who are called from the body of the people for the purpose of assisting in the trial. Upon these jurors, acting as a part of the court, is placed the responsibility of reconciling the conflict in the testimony and to determine upon which side lies the preponderance or greater weight. (Chicago City Ry. Co. vs. Jones 161 Ill. 380; Pressley vs. Chicago 121 Ill. 304; Illinois Central Railway Co. vs. Gillis 38 Ill. 419).

In Lowry vs. Orr, 1 Gilm. 83 the court said: "Where the verdict depends upon the credibility of the witnesses, it is the peculiar province of the jury to judge that credibility and to attach such weight to the testimony of each as may seem to be proper, after a due consideration of all the circumstances arising in the particular case."

In this case the examination of these questions should have been submitted to the jury for his consideration and determination as to whether the appellee had violated the terms of the insurance policy in that or manner in relating his suit. In directing a verdict in this case the trial court erred in assuming the determination of controverted questions of fact.

For the reasons stated herein the judgment of the Circuit Court of Cook County is reversed and this cause remanded for another trial.

REVERSED AND REMANDED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31) 7

8577

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 23 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8577 Agenda No. 44

In The

APPELLATE COURT OF ILLINOIS

Second District

OCTOBER TERM A. D. 1932

Mary Fisk, Appellee vs Charles F. Mittan, personally and as Executor of the Last Will and Testament of Alexander Fisk, deceased, Raymond Grove Lewis, William Henry Lewis, George Sheldon Lewis, Joseph Alex Lewis, Caroline Elliott Jenkins and Mary Louise Porter, Appellants.	Appeal from the Circuit Court of Lee County.

BALDWIN, J.

On or about April 1st, 1913 Mary Fisk, the appellee herein, was married to Alexander Fisk. That after such marriage they lived together as husband and wife at Paxton, Illinois, until on or about January 31st, 1931. On that date the appellee and her husband, Alexander Fisk, entered into a contract for the recited purpose of "settling all property rights and interests, both real and

personal, arising out of the marital relation now existing between them and for the purpose of relinquishing each to the other all interest, both present and future, each may have in and to the property of the other."

By the terms of the contract, however, it was recited that each of the parties thereto released tothe other "all claims anddemands or rights of recovery of alimony or separate maintenance or any other rights, title, claim or demand."

It is further recited that such agreement was intended "by each of the parties as a mutual release, relinquishment and conveyance of all right, title and interest that may now or shall hereafter be, during or at the death of either of said parties hereto, acquired *** by virtue of the said marriage *** and *** to mutually release and waive all benefits of *** dower, homestead, heirship, widow's award and forever bar each other *** from any action to recover any interest *** etc."

On or about August 30th, 1931 the said Alexander Fisk died leaving his last will and testament, in and by which he devised his property to certain nieces and nephews therein named. The appellee was not mentioned in the said will, which was admitted to probate by the County Court of Lee County, Illinois, on or about October 19th, 1931. Charles F. Mittan, one of the appellants herein, was named and qualified as executor of such will.

The deceased left surviving him his widow (appellee herein) and certain nieces and nephews but no children or descendants of children.

On February 9th, 1932 the appellee filed her bill of complaint in the Circuit Court of Lee County, alleging that such contract was unfair, unequal, unjust and procured by said Alexander Fisk without a full disclosure of all his property and that such contract

is contrary to public policy in that it pur orts to release the said Alexander Fisk from his legal liability to support complainant and therefore illegal and void and praying that the contract be declared void by the court and making the executor and beneficiaries of the estate of Alexander Fisk parties defendant. The bill of complaint alleged and the answers admitted the execution of the contract and the fact that the parties lived separate and apart from the time of the making of such contract. The cause was referred to the master in chancery of such court for proof and conclusions. He heard the evidence and on consideration thereof concluded that the equities of the cause were with the complainant and recommended that a decree be entered granting the relief prayed.

Objections to such report were over-ruled by the master. The court ordered that such objections stand as exceptions and upon consideration thereof such exceptions were over-ruled by the court and a decree entered declaring that said contract was inequitable and contrary to public policy and therefore void.

It is urged on behalf of the appellant that the trial court erred in holding that the contract in question was contrary to public policy and therefore null and void because it is said that the contract in question did not contain any provision releasing the said Alexander Fisk from his legal obligation to support the said Mary Fisk, as contended by the appellee. We are unable to accept the contention of appellant as correct because the contract does purport to release all claims for alimony, separate maintenance, etc.

Alimony is simply an allowance fixed by the court for the support of a divorced wife and, as we understand the matter, is not allowed except in cases where the recipient is without fault.

Separate maintenance is simply an allowance fixed by the court for the support of the wife when she resides apart from the

husband without her fault.

It therefore follows that the covenant in this contract "releasing all claims and demands *** of alimony and separate maintenance" does amount to and is a release of said Alexander Fisk from the obligation to support the complainant herein. No other construction can be given such provisions.

In VanKoten vs VanKoten 323 Ill. 325 P. 326 the court said "One of the contractual obligations of the marriage contract is the duty of the husband to support the wife and this contractual obligation can not be abrogated without the consent of the third party,-the State. Husband and wife may contract with each other as to their mutual property rights but the husband can not by contract, either before or after marriage, relieve himself of the obligation imposed upon him by law to support his wife and a contract between husband and wife, one of the material provisions of which is that the husband shall be relieved of the obligation imposed upon him by law to support his wife, is illegal and void as being contrary to public policy." To the same effect is the case of Lyons vs Schanbacher 316 Ill. 569.

This contract in attempting to release the liability of Alexander Fisk for the support and maintenance of his wife is therefore contrary to public policy and void.

It is urged that the complainant was guilty of laches. The doctrine of laches is purely an equitable remedy and is entirely separate and distinct from statutes of limitation. It is applied in equity to prevent injustice and is generally described as the neglect or omission to assert a right for an unreasonable ~~length of~~ period of time. (Ring vs. Lawless 100 Ill. 520). The doctrine of laches, however, has no application to the

assertion of the invalidity of a contract. (Durkee vs People etc. 155 Ill. 354). The fact that the parties may have complied with the contract in part does not render a void contract valid nor prevent the raising of the question of its illegality for the reason alleged here.

Although the evidence in this case is not very satisfactory as to the knowledge of the complainant as to the extent of her husband's property, the master's report and the decree of the chancellor should be given considerable weight and in view of such fact we are not inclined to disturb the decree upon this ground.

We hold that the contract herein was contrary to public policy and void.

The decree of the Circuit Court of Lee County is affirmed.

AFFIRMED.

[illegible] of the invalidity of a monopoly, [illegible] in [illegible], [illegible] 222 [illegible] 1921). The fact that the [illegible] and [illegible] [illegible] the product in [illegible] [illegible] [illegible], and further that [illegible] the making of the [illegible] [illegible] the means alleged here.

Although the evidence in this case is [illegible] [illegible] as to the invalidity of the monopoly in [illegible] [illegible] [illegible], the market, [illegible] and the [illegible] of [illegible] [illegible] should be given consideration [illegible] [illegible] [illegible] such that we are not inclined to [illegible] [illegible] [illegible] [illegible].

It will [illegible] the monopoly issues [illegible] [illegible] [illegible] [illegible].

The decree of the District Court of [illegible] [illegible] [illegible].

[illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On 12 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8590 Agenda No. 35

In The

APPELLATE COURT OF ILLINOIS

Second District

OCTOBER TERM A. D. 1932

The Larabee Flour Mills Company, a corporation,
Appellant,

vs.

Frank Weindruch and Isador Pesses, Copartners, doing business under the firm name and style of Eagle Kash and Karry Markets,
Appellees.

Appeal from the Circuit Court of Rock Island County.

BALDWIN, J.

This is an appeal from the Circuit Court of Rock Island County brought to reverse a judgment of that court sustaining a demurrer to a declaration and dismissing suit at the cost of the plaintiff.

The declaration filed on behalf of The Larabee Flour Mills Company, plaintiff (appellant), alleged that on the 11th day of July 1928, it was a corporation of Kansas City, Missouri and was engaged in the manufacture of flour and selling same under the trade name of "Honest Loaf" and that on such date the defendants, Frank Weindruch and Isador Pesses, partners doing business as Eagle Kash and Karry Markets, made and delivered

to the plaintiff their offer in writing to buy 2,500 barrels of Honest Loaf flour, y-7 grade, in size 49 cotton packages at a price of $6.25 per barrel, payment thereof to be made by thirty day trade acceptances. A copy of such offer is set out in full in the declaration.

It further alleged that on the 27th day of July 1928 such offer was accepted by the plaintiff at its office in Kansas City and a copy of the written acceptance of such offer is also set forth in full in the declaration.

That by the terms of the contract it was provided that the flour was to be shipped to said defendants in scattered shipments to January 1st, 1929 as follows: 210 barrels on September 1, 1928 and a car every two weeks thereafter until such date; that it was further provided that the defendants should furnish shipping directions at least fourteen days before the date of shipment and that pursuant to such shipping directions of defendants, the plaintiff had supplied 210 barrels of flour on October 24, 1928; 210 barrels February 20, 1929; 230 Barrels on July 30, 1929; 205 barrels on November 15, 1929; and 210 barrels on April 15th, 1930 or a total of 1,065 barrels and that the defendants had paid to the plaintiff the purchase price of said 1,065 barrels, but that the defendants had failed and refused to supply shipping directions for the remaining 1,435 barrels at any time, either within the period fixed by the contract or at any other date.

That upon the failure to furnish such shipping directions the plaintiff might cancel the contract or extend the contract thirty days and in such event the defendants were to pay certain charges as set forth in the contract.

It was also alleged that the defendants failed to furnish

to the plaintiff their offer in writing to buy 1,500 barrels of Honest Loaf Flour, V-7 grade, in sacks 49 cotton packages at a price of $6.75 per barrel, payment thereof to be made by thirty day trade acceptances. A copy of such offer is set out in full in the declaration.

It further alleged that on the 27th day of July 1922 such offer was accepted by the plaintiff at its office in Kansas City and a copy of the written acceptance of such offer is also set forth in full in the declaration.

That by the terms of the contract it was provided that the flour was to be shipped to said defendants in partitioned shipments to January 1st, 1923 as follows: 310 barrels on September 1, 1922 and a car every two weeks thereafter until such date; that it was further provided that the defendants should furnish shipping directions at least fourteen days before the date of shipment and that pursuant to such shipping directions of defendants, the plaintiff had supplied 310 barrels of flour on October 24, 1922; 310 barrels February 7th, 1923; 310 barrels on July 30, 1923; 305 barrels on November 18, 1923; and 310 barrels on April 15th, 1924 or a total of 1,055 barrels and that the defendants had paid to the plaintiff the purchase price of said 1,055 barrels, but that the defendants had failed and refused to supply shipping directions for the remaining 1,445 barrels at any time, either within the period fixed by the contract or at any other date.

That upon the failure to furnish such shipping directions the plaintiff might cancel the contract or extend the contract thirty days and in such event the defendants were to pay certain charges as set forth in the contract.

It was also alleged that the defendants failed

such instructions and that the plaintiff did terminate the contract.

That the said 1,435 barrels of flour were not shipped for the sole reason that the defendants had failed to furnish shipping directions and had failed and refused to accept the flour and that the plaintiff had carried out and performed all the covenants on its part agreed to by the said contract and had at all times from July 11, 1928 to the 30th day of August 1930 been ready and willing to ship and deliver to the said defendants all of the remainder of the flour and averred that by reason of the default of the defendants the plaintiff had sustained certain damages and asked judgment therefor in accordance with the terms and provisions of the contract entered into by the parties.

The defendants filed their demurrer to this declaration, which, upon hearing, was sustained by the court and cause dismissed.

The declaration so filed by the appellant simply declares upon a contract entered into by the respective parties to this suit and such contract is set out in full therein.

This contract, by its own terms, provided that in event either party should fail to comply with the terms of such contract, then the other party to same should have a right of recovery in accordance with the terms and conditions fixed by the contract and in the manner therein specified. In other words, the contract itself fixes the basis and method of computation of damages to either of the parties thereto upon the failure of the other to comply with the various terms and conditions thereof.

According to the allegations in the declaration the appellees defaulted in the performance of the contract and having made default therein, the plaintiff had a right to bring its suit

to have its rights determined and its damages, if any, ascertained under the terms and conditions and the manner specified in the contract.

We have examined the contract and the questions raised by the appellees in their demurrer to the declaration and are of the opinion that the contract is a legal and valid contract and if the plaintiff proves the allegations of its declaration, that is, that the defendants had failed to comply with the terms and provisions of the contract and that the plaintiff was damaged thereby then the plaintiff would be entitled to recover such damages so sustained by reason of the breach of the defendants, to be determined upon the basis and in the manner fixed by the contract.

The declaration stated a cause of action and the court erred in sustaining the demurrer of the appellees to the declaration of the appellant.

The judgment of the Circuit Court of Rock Island County is reversed and this cause is remanded with directions to the court to over-rule the demurrer of the appellees to the declaration of appellant.

REVERSED AND REMANDED WITH DIRECTIONS.

to have his claim determined and his damages, if any, ascertained under the terms and conditions set forth hereinafter in the contract.

In this manner the contract and the question raised in the appellees in their demurrer to the declaration and are of the opinion that the contract is a legal and valid instrument and if the plaintiff proves the allegations of the declaration, that is, that the defendants had failed to strictly the terms and provisions of the contract and that the plaintiff has damaged thereby then the plaintiff would be entitled to recover such damage as ascertained by reason of the breach of the contract, to be determined upon the basis set forth in the damage clause of the contract.

The declaration stated a cause of action and the court erred in sustaining the demurrer of the appellees to the declaration of the appellant.

The judgment of the Circuit Court of Cook County is reversed and this cause is remanded with directions to the court to overrule the demurrer of the appellees to the declaration of appellant.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On 23 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

8327 AGENDA 1

ALBERT H. FELMAN & HAZEL
FELMAN BUCHBINDER,

Appellants,

vs

LOUIS M. RUBENS, CLAUD B. RUBENS,
HARRY A. RUBENS, MAURICE M. RUBENS
& ROYAL THEATRE COMPANY, a
Corporation,

Appellees.

APPEAL FROM THE
CIRCUIT COURT OF
WILL COUNTY.

Jett, J.

This is an appeal by Albert H. Felman and Hazel Felman Buchbinder, appellants, from a decree entered by the Circuit Court of Will County dismissing their amended and supplemental bill of complaint against Louis M. Rubens, Claud B. Rubens, Harry A. Rubens, Maurice M.Rubens and Royal Theatre Co., a Corporation, appellees, for want of equity.

The record discloses that on August 25th, 1928, appellants as minority stockholders filed a bill in equity in the Circuit Court of Will County on behalf of the Royal Theatre Co., an Illinois Corporation, against appellees Louis M. Rubens, Maurice M. Rubens, Claud B. Rubens and Harry A. Rubens and the said Royal Theatre Company, in which it was alleged in substance that the appellants were minority stockholders of said Royal Theatre Company, holding and owning approximately 20% of its issue and outstanding capital stock and that the individual appellees together owned approximately the remaining 80% of said capital stock; that said company up toSeptember 1st, 1925, was the lessee of and operated a motion picture theatre known as the Princess Theatre in the City of Joliet; and was also the owner of the building in the said City of Joliet known as the Rialto Square Building which

contained a large and modern theatre known as the Royal Theatre Stores and offices; that on September 1st, 1925, the said Princess Theatre and the Royal theatre were leased by said corporation to the Great States Theatre Incorporated, a Delaware Corporation, which since then operated said theatres and that since September 1st, 1925, the only business of said Royal Theatre Co., was that of operating the building known as the Rialto Square Building (exclusive of the theater portion of said premises), and the renting of two small stores located in the Princess Theatre Building; that because the individual defendants owned a majority of stock of said corporation they manipulated and controlled the affairs and the business of the corporation to their own personal gain and advantage and against the interest of the company and to the detriment of the rights and interests of the appellants as such minority stockholders; that by means of certain resolutions which the bill charges were illegal and void, the appellees as officers and directors of said corporation had voted to themselves large salaries without giving to said corporation any services in return commensurate therewith; that appellee, Louis M. Rubens was drawing from the said corporation under the guise of a salary the sum of $12,000.00 per year and that the other appellees under the guise of salaries were also drawing large sums of money per annum all without any legal authority. Appellants prayed for an accounting by appellees of all sums paid to them by the Royal Theatre Company as salaries or otherwise and for injunctive relief restraining appellees from taking or receiving any further or other funds from the said corporation as salary or compensation while acting as such officers or directors of said corporation.

To the bill of appellants appellees filed an answer denying all of thematerial allegations of said bill and setting up in addition thereto the defense of laches and acquiescence.

contained a large and modern theatre known as the Royal Theatre
Stores and offices; that on September 1st, 1928, the said Princess
Theatre and the Royal theatre were leased by said corporation to
the Great States Theatre Incorporated, a Delaware corporation, which
since then operated said theatres and that since September 1st,
1928, the only business of said Royal Theatre Co., was that of
operating the building known as the Princess Theatre
(exclusive of the theater portion of said premises), and the
renting of two small stores located in the Princess Theatre Build-
ing; that because the individual defendants owned a majority of
stock of said corporation they manipulated and controlled the
affairs and the business of the corporation to their own personal
gain and advantage and against the interest of the company and
to the detriment of the rights and interests of the complainant,
as such minority stockholder; that by means of varying manipu-
lations which the bill charges were illegal and void, the complained
of officers and directors of said corporation caused and acted to dis-
pose large salaries already paid to said officers, and
services in future commensurate therewith; that officers, inclu-
d. Rogers was drawing from the said corporation under the guise of
a salary the sum of $12,000.00 per year and that the other officers
under the guise of salaries were also drawing large sums of money
per annum all without any legal authority. Appellants moved
for an accounting by reasons of all work done by them on the
Royal Theatre Building as salaries or otherwise and for injunctive
relief restraining appellees from voting or receiving any further
or other funds from the said corporation as salary or compensation
while acting as such officers or directors of said corporation.

In the bill of complaint appellees filed to answer
charging all of constituted allegations of the bill and setting
up in addition towards the defense of laches and acquiescence.

To the answer appellants filed their replication and thereupon the cause was referred to the master in chancery of said court for the purpose of taking the proof offered by the respective parties and reporting the same to the court. The master as directed by the order of the Chancellor took the testimony and reported the same. Thereupon appellants obtained leave of the court to file an amended and supplemental bill which after making minor amendments to conform to the proof thus taken, alleged in addition to the charges contained in the original bill that appellees acting as directors of said corporation on May 24th, 1930, while said cause was still pending and undetermined in said court, adopted a resolution fixing the salary of appellee, Louis M. Rubens at the sum of $12,000.00 for the year 1930, which resolution appellants charged was illegal and was brought about through the influence and domination of the said Louis M. Rubens over the other directors of said corporation. Appellees answered said amended and supplemental bill admitting the passage and adoption of said resolution but denying its illegality; the replication of appellants theretofore filed, was ordered to stand as to said answer. The parties, after introducing some slight additional evidence, closed their proofs and submitted the cause to the court on the pleadings and evidence reported by the master. Thereafter the cause was decided by the court and it was held that the sum of $12,000.00 a year was reasonable and proper compensation for the services rendered by Louis M. Rubens and that he was entitled to such salary; that appellants were not entitled to the relief prayed for and that their bill should be dismissed, which was accordingly done, for the want of equity.

From the allegations of the bill, amended bill, and supplemental bill filed, it will be observed that it is the contention of the appellants that certain officers of the said

Royal Theatre Company were drawing excessive salaries and that their salaries had never been fixed by legal resolution of the Board of Directors. It appears that Louis M. Rubens and his brothers, together with the father of the appellants, in the early days of the motion picture business started a movie show in the City of Joliet. George B. Rubens appears to have been a man of considerable means, resided in Indianapolis and furnished the money for the business. At the beginning the business was a modest one but soon grew so that it was very profitable and at the time of the hearing of the case the business had assets estimated at $2,500,000.00, and had bonded indebtedness of more than a million dollars.

It also appears that in 1925 the Royal Theatre Company built a most magnificent building in the City of Joliet, covering an entire city block known as the Rialto Theatre Building. The theatre proper was in the center of the building and all around on the ground floor were store rooms. The upper floors were rented for offices and other purposes. Subsequently the Royal Theatre Company was merged with the Great States Theatres, Inc.; later they were merged with the Publix Theatre Company and later the theatre proper was leased to the Paramount Theatres Company at an annual rental of $72,000.00. The rest of the business and other property owned by the Royal Theatre Company now produces an annual income of approximately $200,000.00. The record also shows that Louis M. Rubens, Maurice M. Rubens and Claud B. Rubens at the beginning of their operations received very modest salaries. As the business began to be profitable their salaries were from time to time increased. By resolution adopted by the Board of Directors, on March 5th, 1923, the salary of Louis was fixed at $12,000.00; Maurice and Claud each at $7,500.00 a year. It is insisted by the appellants that the resolution fixing the

Royal Theatre Company incorporation articles, but it had never been filed by formal resolution of the Board of Directors. It appears that Louis R. Rubens and his brothers, together with the owner of the amusement, L. Ray Lavin of the motion picture business operated a style show in the City of Dallas. George B. Rubens appears to have been a man of considerable means, resided in Indianapolis and furnished the money for the business. At the beginning the business was a modest one but soon grew to such it was very profitable and at the time of the hearing of the case the business had assets estimated at $2,500,000.00, and had banked indebtedness of more than a million dollars.

It also appears that in 1925 the Royal Theatre Company built a most magnificent building in the City of Dallas, covering an entire city block known as the Adolfo Theatre Building. The theatre proper was in the center of the building and all around on the ground floor were store rooms. The upper floors were rented for offices and other purposes. Subsequently the Royal Theatre Company was merged with the Great States Theatres, Inc.; later they were merged with the Publix Theatre Corporation and later the theatre proper was leased to the Paramount Theatres Company at an annual rental of $72,000.00. The rest of the business and other property owned by the Royal Theatre Company produces an annual income of approximately $800,000.00. The record also shows that Louis R. Rubens, Maurice R. Rubens and Albert G. Rubens at the beginning of their operations received very modest salaries. As the business began to be profitable their salaries were from time to time increased. By resolution adopted by the Board of Directors, on June 6th, 1928, the salaries of Louis R. Rubens at $1,000.00, Maurice and Albert G. Rubens at $1,500.00 per month were fixed. It is clear from the evidence that the resolution fixing the

salaries of these officers was illegal and void for the reason that the Board of Directors that passed the resolution were all interested in the salaries and therefore the resolution was not legally adopted.

The appellants contend that the former order of the Board of Directors was legally adopted and any salary that the Rubens' had received in excess of their salary as passed by the Board in 1920 was illegal and that they should be made to account and return this excess in salaries.

The appellant Felman testified that he was not present at the meeting at which the resolution was adopted in 1923, at the time the salary of Louis M. Rubens was fixed at $12,000.00 and Maurice at $7,500.00 a year. Marucie and Louis M. Rubens each testified positively that Felman was present at the March 5th 1923, meeting and voted for the resolution fixing the salaries. Certain facts and circumstances testified to as disclosed by the record support the contention of appellees that Felman was present at the March 5th 1923 meeting. The record discloses that Louis M. Rubens testified that he did not vote for a raise of his salary.

Taking the argument as a whole on the part of the appellants it appears that their objection really goes to the salary of Louis M. Rubens.

It appears that when the salaries were fixed in 1923, the corporation was engaged solely in the business of operating the Princess Theatre and that continued to be its only activity until 1925, when the corporation began to acquire other real estate and to erect the Rialto Building. When this was completed along about September 1925, the Princess Theatre as well as the Rialto Theatre was leased to the Great States Company and the business of the Royal Theatre Company after that time consisted

salaries of these officers was illegal and void for the reason that the Board of Directors that passed the resolution were not interested in the salaries and therefore the resolution was not legally adopted.

The appellants contend that the former members of the Board of Directors was legally adopted and may return that the members had received in excess of their salary as stated in the claim in 1920 was illegal and that they should be made to account and return this excess in salaries.

The appellant Bedson testified that he was not present at the meeting at which the resolution was adopted in 1920, at the time the salary of Louis M. Rubens was fixed at $20,000.00, not exceed at $7,500.00 a year. Reynolds and Louis M. Rubens also testified substantially that Bedson was present at the 1920 meeting and voted for the resolution. Certain Tax and Alternative Writing of the resolution signed by the vested members [illegible] Bedson was present at the March 8th 1920 meeting. The second director Louis M. Rubens testified that he did not vote for a raise of his salary.

Taking the approach as a whole on the part of the appellants it appears that Louis Rubens [illegible] salary of Louis M. Rubens.

It appears that when the accounts [illegible] the corporation was absent [illegible] the Palaces Theatre and that [illegible] April 1920, that the [illegible] and it owned the Radio Building. When this was [illegible] office where September 1920, the Palaces Theatre as well as the Palace Theatre was leased [illegible] business of the Rubens Realty Company [illegible] were.

merely of owning, leasing, operating and managing its real estate interests, as distinguished from the operation of the theatres themselves. On or about the date last above mentioned Maurice M. Rubens ceased to be a paid officer of the corporation, but Louis M. Rubens continued to act as its president and manager, and took upon himself the sole responsibility of what had become a large financial investment in real estate.

At a special meeting of the Board of Directors of the Royal Theatre Company held on Monday, March 5, 1923, at the hour of eight o'clock P. M., the following resolution was adopted: -

"Resolved, That the salary of Louis M. Rubens, Maurice M. Rubens, and Claud B. Rubens, beginning March 1, 1923, be fixed ~~and~~ on the bases of $12,000.00, $7,500.00 and $7,500.00 per year respectively.

"There being no further business, the meeting adjourned."

It appears that no reference is made to the salary in the record of the Stockholders and Directors meetings after this until the Stockholders meeting in 1928, five years later. This meeting was held on February 4, 1928. The minutes do not appear in the Minute Book for some reason. It appears that the appellant, Albert J. Felman, had a shorthand report of the proceedings which were called for by appellees and the same was produced and put in evidence. It discloses that all the stockholders were present except the mother and sister of appellant, Albert J. Felman, for whom he held proxies. It appears that the appellants were also represented at the Stockholders' and Directors' meeting held on February 4, 1928, by Samuel E. Hirsch, one of the solicitors for appellants in this cause. At this meeting the Stockholders re-elected the same Board of Directors; Mr. Hirsch, among other things raised a question as to the President's salary. The notes of the stenographer of appellant, Albert J. Felman, heretofore referred to, disclose the fact that at the meeting of the

Directors on the day last above mentioned, objection was made to continuing Louis M. Rubens' salary. A motion was made that his salary be discontinued, the motion was lost for want of a second. It further appears that the record of the Stockholders' and Directors' meeting of February 4, 1928, is the first record showing objection to the salary of Louis M. Rubens.

The record further discloses, that the full Board of Directors in 1930, not one of whom, except Louis M. Rubens, had any interest in the resolution or had drawn any salary for some years past, again fixed Louis M. Rubens salary at $12,000.00. This was, in effect, a ratification of the previous action of the Board of Directors. It will be observed that the salaries as fixed by the resolution in 1923 were not merely for that year, but were "per year" and were presumed to continue until changed by action of the Board of Directors, or until the officers ceased to act as such, or there was some substantial change in the nature of the services rendered.

We take it that a mere change in the character of the services rendered would not be sufficient to overcome the presumption that the salary should continue and the burden was cast upon appellants to show that Louis M. Rubens' new duties did not warrant the salary previously fixed; as to Maurice M. Rubens, his duties did not change but remained the same untilsome time in 1925 when he ceased drawing a salary. The nature of the services rendered by Louis M. Rubens did, to some extent, change after September 1925, but we are unable to reach a conclusion as contended for by appellants that after that date no services of a compensable nature were rendered, or that they were of less value than those previously rendered. It is certainly true that if Louis M. Rubens earned a salary as fixed for him of $12,000 from 1923-1925 for managing and operating the Princess Theatre, he certainly earned

directors on the day that a new monitor, [illegible] to
restoring Louis X. Tubens' salary. A motion was [illegible] to
salary be discontinued. The motion was lost and the motion [illegible]
It further appears that the record of the Board of Directors' [illegible]
directors' meeting of February 4, 1958, [illegible] also
the objection to the salary of Louis X. Tubens.

The record further discloses, that the full board of directors
in 1950, not one of whom, except Louis X. Tubens, had any interest
in the resolution or had drawn any salary for employee work,
again fixed Louis X. Tubens salary at $12,000.00. This was, in
effect, a ratification of the previous action of the board of
directors. It will be observed that the minutes as signed by
the resolution in 1950 were not merely for that year, but were
"per year" and were assumed to continue until changed by action
of the Board of Directors. [illegible]
as such, or there was any additional [illegible]
the services rendered.

[illegible]
[illegible]
[illegible] to show that Louis X. Tubens did not
[illegible] the salary previously fixed; as a [illegible],
the Board did not change but approved the [illegible]
to Louis when he ceased drawing a salary. The [illegible] of the services
rendered by Louis X. Tubens did, in fact, [illegible]
September 1955, but we are unable to [illegible]
[illegible] that either the services of a competent
[illegible], we find that [illegible] Louis Tubens [illegible]
[illegible]. [illegible]
[illegible] for [illegible] 1952-1955 for
[illegible] the [illegible]

that amount since 1925 in the management of the corporation of an investment of over two million dollars and an annual income of $200,000 or more with all the responsibilities that necessarily follow.

The record in this case is extremely voluminous. We have put in much time in trying to inform ourselves concerning the facts as they are disclosed by the record. No one can read this record without becoming convinced that Louis M. Rubens, since September 1925, earned the salary that was paid to him; namely, $12,000 per year. It had the approval of the majority of the directors, all of whom had substantial interest in the corporation as stockholders and this is further evidenced by the fact that in 1930, during the pending of this cause, his salary was again fixed at the same amount by the action of the Board of Directors, which we think, was valid.

To our minds the record authorizes the following conclusion: That is, that the Royal Theatre Company had an investment of practically more than two million dollars and that the rentals are approximately $200,000 per year; that the company owns other buildings aside from the theatre building proper; that the original investment of appellant's father was $4,000; that it has increased in value until now it is worth something like $450,000.

An examination of the record leads us to believe that Louis M. Rubens is, and has been, the business head of this concern from its conception, and while the brother in Indianapolis made it possible perhaps for them to operate the way they did, it was the business insight of Louis M. Rubens that brought the company to what it is at this time.

The burden of proof was upon the appellants to establish, by the greater weight of the evidence, all the material allegations of their original bill, amended bill and supplemental bill. In

has amount since 1925 in the management of the [illegible] of an investment of over two million dollars and an annual income of $200,000 or more with all the responsibilities that necessarily follow.

The record in this case is [illegible]. We [illegible] does not in any [illegible] is trying to [illegible] facts as they are disclosed by the record. No one can read the record without [illegible] that Louis [illegible] September 1926, [illegible] the salary that was paid [illegible], $12,000 per year. It had the approval of the majority of the directors, all of whom had substantial interest in the corporation as stockholders and this is further evidenced by the fact that in 1930, during the pending of this cause, his salary was again fixed at the same amount by the [illegible] of the Board of Directors, which we think, was valid.

We [illegible] the record justifying the following conclusions: That is, that the Royal [illegible] Company had an investment of practically more than two million dollars and that its [illegible] are approximately $200,000 [illegible] aside from the [illegible]; that the original investment of [illegible]'s father was $4,000; that it has increased in value until now it is worth something like $480,000.

An examination of the record [illegible] that Louis R. [illegible] is, and has been, the [illegible] of this com- pany from its [illegible], and while his [illegible] made it possible [illegible] and the [illegible] Louis R. [illegible] as what it is at this time.

The burden of proof was upon the appellants to establish, by the greater weight of the evidence, all the material allegations of their original bill, [illegible]. In

our opinion they failed to do so. There are some other questions raised and discussed but in view of the conclusions we have reached we do not care to extend this discussion any further.

We conclude, therefore, that the conclusion reached by the Chancellor is supported by the evidence and the order and decree of the Circuit Court of Will County will be affirmed, which is accordingly done.

Decree affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(65027—1M—9-31) 7

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8520 No. 8.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

TO THE OCTOBER TERM, A. D.1932.

THE GLIDDEN COMPANY,
a Corporation,
Plaintiff in error,

vs.

HARDING P. FEDDE,
Defendant in error.

Writ of Error to the Circuit Court of Kankakee County.

Baldwin, J.

This case involves a writ of error, sued out in this Court to the Circuit Court of Kankakee County, and concerns the question of the liability of a partner claiming to be a limited partner under the Uniform Limited Partnership Act of this State.

It appears that on June 29, 1925 George T. Brill and Harding P. Fedde entered into a partnership under the firm name of Brill and Fedde for the purpose of painting automobiles. Both parties furnished each one-half of the capital of $1750.00. Brill was to devote his exclusive time to the business and Fedde was not to be active; the expenses and losses of the business were to be paid out of the capital, or by Brill and all accounts payable were to be charged to Brill and he was to assume full liability for payment. Fedde was not to be liable for any amount over and above capital and the profits were to be divided three-fourths to Brill and one-fourth to Fedde.

Under this arrangement they bought out a business previously operated under the name of Garvin Auto Painting Company and continued the business at the same location in Kankakee.

On September 24, 1929 Fedde sold his interest in the business to Brill for $1000.00, taking notes in payment and chattel mortgage on all the partnership property to secure the payment of the notes.

Fedde then retired from the business, but it appears that he never foreclosed the mortgage or took possession of the mortgaged property and that the notes still remain unpaid.

The Plaintiff in error had been selling Garvin Auto Painting Company previously to the date of the partnership between Brill and Fedde. The business of Plaintiff in error with the partnership was handled by its witness, Dyer. He did not know Fedde, but transacted all business with Brill under the style of Garvin Auto Painting Company. He saw Brill three or four times during 1925, once in June and another meeting a little later and was first informed of the partnership by Brill. During the period of the partnership, June 29, 1929 to September 24, 1929, plaintiff in error sold and delivered to Brill at this place of business merchandise to the amount of $566.35 which was not paid for.

The limited partnership agreement between Brill and Fedde was recorded in the office of the Recorder of Kankakee County on May 20, 1926, and it appears that this recordation was accomplished after Fedde learned that Plaintiff in error proposed to hold him liable for the account.

Suit was filed by plaintiff in error to the May Term 1926 of the Circuit Court against Fedde. The declaration first filed was against Brill and Fedde, doing business under the name of Garvin Auto Painting Company; an amended declaration was filed against Brill and Fedde doing business under the name of Brill and Fedde, amendment being made to conform to the partnership agreement. An affidavit of account, etc., was filed; both defendants were served and Brill was defaulted. Fedde filed a plea of general issue with affidavits of merits and special pleas, setting up the defense that he was a limited partner only, admitting the partnership with Brill under the firm name of Brill and Fedde, but alleging that he thought it was a limited partnership and that he was not bound by the obligations of his partner Brill; that as soon as helearned that it was necessary to record the partnership agreement he immediately filed it in

Yodde then retired from the business, and it appears that he never disclosed the mortgage or bank indebtedness of the company property and that [illegible].

The plaintiff in error had been [illegible] Company previously to the date of the partnership between Brill and Yodde. The business of plaintiff in error [illegible] only was handled by its witness, Dyer. [illegible], but transacted all business with Brill under the style of [illegible] Building Company. He saw Brill there or [illegible] during 1922, once in June and another meeting a little later and was first informed of the partnership by Brill. During the period in the partnership, June 26, 1922 to September 24, 1922, plaintiff in error sold and delivered to Brill at this place of business merchandise to the amount of $[illegible].55 which was not paid for.

The limited partnership agreement between Brill and Yodde was recorded in the office of the Recorder of Lawrence County on May 20, 1924, and it appears that this recordation was accomplished after Yodde learned that plaintiff in error proposed to hold him liable for the [illegible].

Suit was filed by plaintiff in error to [illegible] from 1922 of the Circuit Court against Yodde. The declaration [illegible] was against Brill and Yodde, doing business under the [illegible] against Brill and Yodde doing business under the name of Brill and Yodde, [illegible] agreement. An affidavit of account, etc., was filed; [illegible] defendants were served and Brill was defaulted. Yodde filed a plea of general issue with stipulations [illegible] place, setting up the defense that he was a limited partner only, admitting the partnership with Brill under the [illegible] of Brill and Yodde, but alleging that he thought it was a limited partnership and that he was not bound by the obligations of the partner Brill. [illegible] to result the partnership agreement be immediately filed it in

the office of the Recorder and he renounced his interest in the profits of the business and that he did not at any time receive any profits from the partnership.

On the trial of the cause before the Court the plaintiff in error introduced the partnership agreement in question, as evidence on its behalf, and the Court upon a hearing of the cause decided that Fedde was not liable.

It is the contention of the plaintiff in error that defendant in error did not comply with the terms of the Limited Partnership Act, by not recording the instrument and by selling his interest and taking notes securing the same by a mortgage on the property of the partnership, without regard to the rights of creditors. The defendant in error contends, that, believing himself to be a limited partner he can not be held as a general partner, that he was not a general partner because he took no part in the control of the business; that he substantially complied with the Limited Partnership Act by recording the partnership agreement as soon as he learned that it was required by law to do so, and finally at the end renounced all his interests in the business, profits, compensation, capital and otherwise, and claimed the benefit of these acts as excluding him from being held as a general partner in the partnership business.

The plaintiff in error seeks to charge Fedde as a general partner for this account, for the reasons above set forth as contended, and the alleged liability is predicated upon the provisions of the Uniform Limited Partnership Act, Chapter 106½ Part 7, Smith-Hurd Revised Statute 1931. Section 2b of that Act provides that the certificate of limited partnership shall be filed in the office of the Recorder of Deeds of the County where the principal office of such partnership is located, but it does not say when it shall be filed. The evidence in this record is that it was filed for record in the proper County on May 20, 1926.

Secton 5 of the Uniform Limited Partnership Act provides, among other things, that the surname of a limited partner shall not appear in the partnership name, unless under certain contingencies which do not apply here.

The record shows that the surname was used in the limited partnership agreement drawn up by Brill and Fedde, but it does not appear from the record that plaintiff in error knew anything about the firm name of Brill and Fedde until after they began pressing for the bill to be paid, and then for the first time learned that Fedde was apartner, claimed to be a limited partner and plaintiff in error secured a copy of the partnership agreement and on the trial of this cause plaintiff in error offered the agreement in evidence and it was received.

The witness, Dyer, who was the only witness for the plaintiff in error, stated that his company, meaning the plaintiff in error, had a continuous account with the Garvin Auto Painting Company right through from February 1925 to January 30, 1926, that the name of the Garvin Auto Painting Company was used and the goods charged and that is the way they asked to have the shipments made starting in February 1925 and so continuing until January 1926, and that plaintiff in error, gave credit to the Garvin Auto Painting Company and billed the goods to them and as far as they knew, George Brill was the proprietor, and again in the record it appears that he testified that they continued to extend credit to Brill under the name of Garvin Auto Painting Company. It thus appears from the record that while the defendant in error did allow his surname to appear in the partnership name, yet so far as this case is concerned no credit was extended to the partnership on his account and no one was misled thereby.

It seems to us that it is the policy of the Statute, as expressed in this Act, to give effect to the purposes sought to be attained by regulating associations and one of its main objects

is to limit the liability of limited partners to general creditors, so long as its provisions are substantially complied with. In the instant case we can see that no one was misled by Fedde allowing his surname to be used in the partnership name.

Complaint is made that Fedde violated sections of the Uniform Limited Partnership Act by taking a chattel mortgage on the property of the partnership to secure his own debt, and this is substantiated by the record, but it further appears that when the provisions of the Act were brought to his attention, in conformity with Section 11 of the Act, which provides as follows: --

> "A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income."

He immediately renounced all interest in the profits of the business or other compensation by way of income and never sought to exercise his rights as mortgagee of such property, thereby leaving such property to be subjected to the claims of general creditors.

Some Supreme Court decisions are cited by plaintiff in error to sustain its contention, but on examination thereof we find that they were cases arising prior to the enactment of this Statute, that is, June 28, 1917, and therefore have no application to the points here raised.

The record shows that defendant in error took no active part in the business of the company and that as soon as he discovered that certain provisions of the Act had not been complied with by him, he took all necessary steps to protect himself by complying with the provisions of the Act.

is so that the liability of limited partners is present whenever, so long as the provisions are substantially complied with. In the instant case we can see that no one was misled by Fedde allowing his surname to be used in the partnership name.

Complaint is made that Fedde violated sections of the Uniform Limited Partnership Act by issuing a stock certificate in the property of the partnership to secure his note, but this is unsubstantiated by the record, but it further appears that the provisions of the Act were intended to the advantage, in substance, with respect to the use, also involved in Fedde:

> "A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership engaging in the business or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income."

In substantially renounced all interest in the profits of his business or other compensation by way of income and never claimed or exercised his rights as creditors of such business. Neither learned such property to be subjected to the claims of general creditors.

Good Supreme Court decisions are clear of the district in error in sustain the contention, yet in questioning doubt as that that were never acting prior to the commencement of such status. That is, that he, that, and therefore not an activities in the people and taken.

The record shows that defendant is entitle to a judgment in the amount of the property and that as such is the claimed that certain provisions of the Act has not been complied with by him, he has all necessary claim to judgment if complying with the provisions of the Act.

The Act provides that the rule that Statutes in derogation of the common law are to be strictly construed shall have no application to this Act and shall be so interpreted and construed as to effect its general purposes, etc., (Smith-Hurd Chapter 106½ Par. 28 (1)), and it further provides that a limited partnership is formed if there has been substantial compliance in good faith with the requirements of the Act. (Smith-Hurd Chapter 106½ Sec. 2 (2)).

After a careful reading of this record, we are led to the conclusion that there was a substantial compliance on the part of Fedde with the requirements of this Act in good faith and that the Court properly so found and that Fedde was not liable under this partnership agreement and the judgment of the Circuit Court of Kankakee County is affirmed.

AFFIRMED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(65027—1M—9-31) 7

8529

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.
Hon. JAMES S. BALDWIN, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 28 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8529. A. 11

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM A. D. 1932.

MAE RASTMAN, Plaintiff
(Appellee)

vs.

EMMA LINDSTROM, Defendant
(Appellant)

Appeal from Circuit Court
Winnebago County.

Baldwin, J.

* * * * * * * *

This suit comes here on appeal by Emma Lindstrom, appellant, hereinafter referred to as defendant, to reverse a judgment rendered against her for Three Thousand Five Hundred Dollars ($3,500.00) for personal injuries received by Mae Rastman, appellee, hereinafter referred to as Plaintiff, on February 15, 1930, in an automobile owned by Defendant.

The Plaintiff, a young lady of twenty years, had been keeping company for about four years with Stanley Lindstrom, son of the defendant, who was also of the age of twenty years. He had worked four or five years in his mother's furniture store on Broadway in Rockford, Illinois and resided with her.

It appears that on the night in question, being the night that the accident happened that resulted in the injury com-

No. [illegible].

IN THE

APPELLATE COURT OF ILLINOIS

[illegible] DISTRICT

GOODCHUM BUS, A. D. 19[illegible].

[illegible], Plaintiff
(Appellee)

vs.

Appeal from [illegible] [illegible]
[illegible].

[illegible] LINDSTROM, Defendant
(Appellant)

BRIEFS, A.

* * * * * * * * *

This suit came back on appeal to [illegible] [illegible], [illegible], hereinafter referred to as defendant, to reverse a judgment rendered against her for Three Thousand Five Hundred Dollars ($3,500.00) for personal injuries received by the [illegible], appellee, hereinafter referred to as "Plaintiff", on February 23, 1940, in an automobile owned by [illegible].

The Plaintiff, a young lady of twenty years, [illegible] [illegible] evening for about four years with [illegible] [illegible], son of the defendant. He was also of the age of [illegible] years. He had worked four or five years in the [illegible] [illegible] [illegible] in Boston, Illinois and resided [illegible].

It appears that on the night in question, [illegible] [illegible] that the defendant borrowed that evening in the [illegible]

plained of, the son of the defendant took appellee to a dance, and thereafter, between twelve and one o'clock A. M., while they were riding in his mother's car, the car of the defendant, in the direction of her store and his home, they were struck at a crossing by a fast moving Illinois Central freight train. Stanley Lindstrom was instantly killed and the Plaintiff received the injuries for which she brings this suit.

It further appears that the declaration was filed to the January term, 1931, of the Court, and averred that the defendant was liable because of the "Family use" doctrine.

In November 1931, Plaintiff dismissed her suit, but later during the term had the cause re-instated and filed an amended declaration predicating liability on the ground of agency of the son for his mother.

The defendant plead general issue and special pleas denying agency and denying operation of the car.

The evidence on this issue for the Plaintiff is in a general way to the effect that the mother in plaintiff's presence had on a number of occasions told her son to drive around past the store when he was driving around and see that the front display lights had been turned out and that they were driving in that direction at the time of the collision, and that the couse that they had pursued was not exactly the shortest route to the home of the plaintiff, the young lady in question. There is no direct evidence in the record that the store was their destination or that they intended to drive past it at the time in question.

The evidence im behalf of the defendant was a denial by the mother that such instructions had been given at any time; that the front display lights were taken care of by a merchant police; that it required a special key to turn off such lights

[illegible] of, the son of the defendant took [illegible] to a dance, and thereafter, between twelve and one o'clock A. M., while they were riding in his mother's car, the car of the defendant, in the direction of her home and his home, they were struck [illegible] by a fast moving Illinois Central freight train.

Stanley Lindstrom was instantly killed and the plaintiff received the injuries for which she brings this suit.

It further appears that the declaration was filed in the January term, 1931, of the court, and averred that the defendant was liable because of the "Public Act".

In November 1931, plaintiff dismissed her suit, [illegible] taking the bare bones of the count pleaded with [illegible] counsel substituting instead liability on the ground of negligence of the son for the driver.

The defendant filed general issue and special [illegible] having waived and tendering admission of the suit.

The evidence on this issue for the plaintiff is in substance as follows: [illegible] the defendant in [illegible] was not in a manner at [illegible] that the time when he was driving around and saw that the front driving lights had been turned out and that they were driving in that direction at the time of the collision, and that the [illegible] they had [illegible] the [illegible] to the [illegible] of the plaintiff, the [illegible] [illegible] testimony that the [illegible] [illegible] in question.

The evidence in behalf of the defendant was a denial by the [illegible] that such instructions had been given at any time; that the front driving lights were turned out by a [illegible] defendant; that it rendered a [illegible] [illegible]

and that Stanley had no such key on the night in question; that the route they were driving was also the nearest route to Stanley's home and to a restaurant they customarily visited for refreshments at night; that the standing train at the crossing wholly obscured the view of the fast approaching train on a parallel track, and that Stanley Lindstrom, using due care did not discover the approaching train until too late to avoid being struck.

In rebuttal, the Plaintiff was permitted to testify over objection that at the time of the accident they were not going to Stanley Lindstrom's home or to the restaurant mentioned and the admission of this testimony is alleged to be error.

The Plaintiff relies upon her right to ~~rever~~ recover by reason of the agency or master and servant relationship existing between the deceased and the defendant, and our belief is that this is the important question in this reocrd and upon the record offered on that question, the decision of this case will depend.

The Plaintiff in this case, while upon the witness stand, upon this question, testified as follows:

"Q Were you ever present at any time when Emma Lindstrom had some conversation with Stanley Lindstrom concerning any of his duties in relation to the business, after working hours, that is, after six o'clock, closing hours, whatever it was, in relation to what his duties were?"

"She, (defendant) said, "Mae, you help Stanley look after the store and then you won't mind, when you are out riding to go past the store and turn out the light." She told him to look after the store, to manage the store and turn out the lights in the store after closing time, if the merchant policeman didn't turn them out. She said those same things many times. I don't remember anything further said as to the time he should make those trips.

and that Stanley had no such key on the night in question; that the route they were driving was also the nearest route to Stanley's home and to a restaurant they customarily visited for refreshments at night; that the standing train at the crossing wholly obscured the view of the fast approaching train on a neighbor track, and that Stanley blindness, making due care impossible over the approaching train until too late to avoid being struck.

In rebuttal, the Plaintiff was permitted to testify over objection that at the time of the accident they were not going to Stanley Lindstrom's home or to the restaurant mentioned and the admission of this testimony is alleged to be error.

The Plaintiff relies upon her right to [illegible] by proof of the issues in dispute [illegible] from the defendant and the defendant's right to show that in the instant question in this record and upon the record filed on that question, the decision of this case will depend.

The Plaintiff in this case, while upon the witness stand, upon this question, testified as follows:

"Q. Have you ever present at any time when some Lindstrom had some conversation with Stanley Lindstrom concerning any of his duties in relation to the business, after working hours, that is, after six o'clock, during [illegible], whatever it was, in relation to what his duties were?"

"Ans. (Interpreted) said, 'Now, go home [illegible] the store and then you won't mind, when you are out midnight to go open the store and turn out the lights.'" She told him to look after the store, to manage the store and turn out the lights in the night after closing time, if the [illegible] [illegible] turn them out. She said those same things many times. I don't remember definitely further said as to the time he should make those trips.

Q Now, Miss Rastman, on any of these times that you have been with Mr. Lindstrom and his mother riding in the automobile, have you ever overheard or been present when some conversation took place in reference to the business which Mrs. Lindstrom conducted and as to what Stanely Lindstrom's duties were with reference to the seeing of that business or looking after it after closing hours at night?

A. Mrs. Lindstrom told him, told Stanley to watch after the store, take care of it and turn out the lights before he came home at night and we would take her home and then she would tell us to go and turn out the lights.

Mr. Reno: I object to what they would do.

The Court: Yes, what they did - took her home, that may be stricken out.

Q. Well, how many times have you heard her tell you to do that before you came home at night?

A. Many times.

Q. Did she say anything further to you or to him in your presence about that further - about the matter of going over and looking at the store?

A. No, just that he would do that - that hewould look after the light before he came home; I told that once."

On cross-examination she said: --

"When I was out with Stanley on these occasions, he never went into the store, I don't know, as a matter of fact whether he had a key to the store or not. I never saw him go into the store of a night, He would turn off the lights from inside the doorway, to the west of the door that enters the store. This doorway leads to some apartments upstairs and the switch for the lights is just inside the door at the landing. He would just go up and turn that switch with his hands just like any

Q. Now, Miss Bentman, on one of these times that you came down with Mr. Lindstrom and his mother sitting in the sitting-room, were you ever requested to see someone with some [illegible] which took place in reference to the business which Mr. Lindstrom mentioned and to go over Mrs. Lindstrom's [illegible] relations to the sending of that business to Lincoln [illegible] after closing hours in night?

A. Mrs. Lindstrom told me, could Stanley be woken after the store, take care of it and turn out the lights before he came home at night and we would take her home and then she would tell us to go out and put out the lights.

Mr. Sorr: I object to what they would do.

The Court: Yes, what they did - took her home, that may be relevant yet.

Q. Well, has any times been when you heard any call come to the door before you came home at night?

A. Only once.

Q. Did you ever [illegible] Mrs. Lindstrom, in one of [illegible] some conversation about that business - about the matter of going [illegible] involving in the street?

A. No, just that he would do that - that happened last after the light before he came home; I told that once."

Mr. Cross-examination also said: -

"Then I was out with Lindstrom [illegible] accompany, - never went into the store. I don't know, in a matter of fact Lindstrom he had a key in the store so you. I never saw the [illegible] take the share of a night. He would come off the little from inside the country, on the back of the [illegible] [illegible]. This country lines in some westbrooke neighbors [illegible] the lights to turn inside [illegible] as [illegible]. He would [illegible] go out from back [illegible] [illegible]

ordinary switch. I have seen him do that many times when I have been right outside in the car. I did not know that it requires a special key to turn into that switch in order to turn off the lights and I didn't know he had to have a key. I am not positive that he didn't use any key or instrument and never saw him take a key or anything out of his pocket to turn out the switch. I have been back to the store since the accident, but I haven't noticed the location of the place where they have the switch.

When we went to Lou's barbecue that night, we didn't go in. There were three or four other cars there. I have never heard Mrs Lindstrom give Stanley any directions besides to turn out the lights except that I have heard her say to look after the whole store.

Q. Well, that is the only thing that she specifically told him to do, is to turn out the lights?

A. And to look after the rest of the store."

To rebut this, defendant on her own behalf, testified as follows: --

"Q. Witness, I'll ask you if on any occasion when Mae Rastman was in your presence, or at any other time did you ever tell your son, Stanley Lindstrom, to turn out the window lights at your store?"

A. Not outside.

Q. Did you ever tell him to turn out the lights inside - the inside lights in the store?

A. Once I did.

Q. When was that?

A. That was Christmas, 1928, before Christmas 1928.

Q. What was the occasion for that?

A. We had bought a lot of lamps and Stanley put them

up in the window; we closed at 6 o'clock and he wanted them to burn or be lighted longer than that and he had all these lighted lamps burning and he asked if he could have the key to my place so he can go in there and turn off those lights - let them burn a little bit longer at night because they were sitting in there pretty for the Christman trade.

Q. Did you give him the key to go down and do that?

A. Yes, I gave him the inside key to do that.

Q. That is the key to the store?

A. Yes, sir.

Q. Witness, with reference to the outside of this store - that is the outside lights - outside switch on the lights, what kind of a switch was that in February 1930?

A. There was two switches - one in the door and one on this side, outside, to turn with the key - any one could turn it on and turn it off, outside the sign, but the turn-key inside the door and the outside, on one wall, they have to have a turn-key.

Q. Have to have a key?

A. Yes."

Q. And how many keys did you have for that purpose?

A. Only one.

Q. One key?

A. Yes, sir, one key.

Q. I'll ask you to look at this key which I will ask to have marked Defendant's Exhibit 1, and state if that is the key?

A. That is the key to the outside.

Q. Do you know where that key was on the night when Stanley Lindstrom was killed?

A. It was inside my store."

Cross-Examination by Mr. North.

"I never told my son Stanley to go and see that the

my in the window; we closed at 6 o'clock and we turned them, so they or be lighted longer than that and he had all these lights burning and he asked if he could have the key to my place so he can go in there and turn off these lights -- let them burn a little bit longer at night because they were visiting in there until far too (illegible) times.

Q. Did you give him the key to go into your (illegible)

A. Yes, I gave him the (illegible) to (illegible).

Q. That is the key to the store?

A. Yes, sir.

Q. Witness, with reference to the outside of this place -- that is the outside lights - outside entrance on the lights, what kind of a switch was there in February 1950?

A. There was one switchbox - one is low down and one on the side, outside, to turn with the key - any one would turn it on and turn it off, outside for sale, but the entrance (illegible) door and the outside, on one wall, they have to have a turn-key.

Q. Have to have a key?

A. Yes."

Q. And how many keys did you have for that purpose?

A. Only two.

Q. One what?

A. Two, sir, one key.

Q. Did you go in into it (illegible) with (illegible) some alcohol Commission's matters ?, and since (illegible) have it (illegible)

A. That is the key to the outside.

Q. Do you know where that key was on the night when Stanley Lindstrom was killed?

A. It was inside my store."

Cross-Examination by Mr. Hurd.

"I never told my wife Blanche to go and see that the

lights were turned off and never gave him any such instructions except the one time I told him. Sometimes when he went by to look at the light, he said it was off but many times he came home and told me he turned the sign off because it was on. He told me but I never told him to go and turn it on or turn it off.

Q. But you did ask him about the lights on occasions and asked him if everything was all right when he came home at night?

A. No, I don't ask him.

Q. You did, from time to time, tell him, "Now Stanley go look at the store before you come home at night?

A. No, I didn't.

I never told him anything like that, I t was closed and the policeman took care of the lights outside, but Stanley had come home and reported a good many times that he had turned off the sign. I never found that the sign had been on all night. The way we happened to have such a conversation was that he came home some night, I couldn't tell when and said the sign was burning so he went and turned it off and I said, "All right." I never knew of the sign burning after half-past ten or eleven o'clock. That was the last minute. Stanley has been in the store since he was sixteen years old andduring the last four years he was the only male member of my family in the business, but Mrs. Bodine, his sister, has been with ~~se~~ me since she was fifteen years old. She kept the books. I did not rely on Stanley to run and manage the store. He was engaged as salesman in the store and collected. I did not go to Stanley to talk over the affairs of the store. He wasn't in the business. I did ask him to go and collect and asked him to be sure that everything was straight and so on. Out of the clerks in the store, it was not Stanley, but Howard, that other fellow, on whose judgment

lights were turned off and never gave him any such instructions
except the one time I told him. Sometimes when he came to my
back or the light, he said it was off but many times he came back
and told me he turned the wick off because it was on. He
told me but I never told him to go and turn it on or turn it off.

Q. But you did ask him about the lights or something
and asked him if everything was all right when he came back at
night?

A. No, I don't ask him.

Q. You did, from time to time, tell him, "Are Stanley
or Jack at the house before you come home at night?

A. Mr. T (inaudible).

I never told him anything like that. I was interest but
the wellhouse was back of the light house, but I never let
them know my business a good way. Times that he had around at
the place. I never found that out also but been on all night.
He may be interested in some way a conversation was that he
was home when night. I wouldn't tell them not said Mr. Allen was
leaving at 8 o'clock and turned it all out I said, "All right."
I never knew of the man burning after half-past ten or eleven
o'clock. That was the last minute. Stanley has been in the
store since he was sixteen years old including the last four
years he was the only male member of my family in the business,
but Mrs. Hodine, his sister, has been with me since she was
fifteen years old. She kept the books. I did not rely on
Stanley to run and manage the store. He was engaged in salesman
in the store and collected. I did not go to Stanley to talk over
the affairs of the store. He wasn't in the business. I did ask
him to go and collect and asked him to do some work everything
was straight and so on. Not at the office in the store. It was
not greater, but sometimes, then other fellows, he store interest

I more or less relied.

Miss Rastman has been in my home a good many times and I have been out riding with her a good many times. I have never at any time been out riding with her in the car and said, "Well, let's go past the store and see if the lights are all right and see if the store is all right."

Q. Isn't it a fact that you never at any time when you were out riding with Miss Rastman, came back home with out at first requesting Stanley to take you past the store and look to see if the lights were lighted or turned out and see if the store was all right?

A. No, I went home. I didn't stop at the store when we was out."

"I never asked him to go by and look at the store and look at the light only once and I never asked Stanley to drive past the store when we were out with Miss Rastman."

The plaintiff and defendant are the only ones who testified upon this question and our decision in the matter, as we view it, rests upon this testimony.

It will be seen upon a careful consideration of this evidence upon the question of the existence of the agency or master and servant relation, which is essential to recovery, there is no direct evidence and the circumstances by which this relationship is sought to be established are uncertain. There is in effect no substantial testimony offered by the plaintiff, save that of the plaintiff herself, which is denied by defendant, to establish, by the preponderance of the evidence, that at the time of the accident Stanley Lindstrom, the driver of the defendant's car, was acting within the scope of his employment as a salesman for his mother's furniture store, or of any specific or general instructions concerning the lights on the store that night.

I were so long called.

Miss Lawson has been in my room a good many times and I have been out driving with her a good many times. Miss Lawson is our first home when our driving rig has to the car and all well. Lady's go back the store and see if the lights are right and when the car is all right.

Q. Just is a look this over where of our view from the driving rig Miss Lawson, some had some rig out at first occasions should be this rig good the above rig look to see if the lights are lighted or cleaned out and see if the store has all right?

A. Yes, I want home. I always rigs on the house when we are out.

Q. Were asked you to go by and stop at the store and look at the light only once and I never asked (Smiley to this good for store who or were out rig Miss Lawson?

The objection and defendant are in only case and justified upon this question and cross-examination in the matter, as we view it, rests upon this testimony.

It will be seen upon a careful consideration of this evidence upon the question of the existence of the agency or master and servant relation, which is essential to recovery, there is no direct evidence and the circumstances by which this relationship is sought to be established are uncertain. There is in effect no substantial testimony offered by the plaintiff, save that of the plaintiff herself, which is needed to establish, in addition, by the circumstances of the evidence, that at the time of the accident stated plaintiff, the driver of the vehicle, was acting for the defendant at the time of the accident in a business for his employer's business, or of any evidence of general instructions concerning the rights on the store that this

The evidence bearing upon question of agency is very meager and the best that can be said of it is that it is general in its nature. The evidence discloses that the driver of the car that night was a salesman in his mother's store and many times while out driving at night with the plaintiff in the case, drove by the store and if the lights were burning in the sign he would get out and turn them off and would then go home and tell his mother that he had done so. There does not seem to be in the record any direct evidence as to any duty the driver of the car owed the owner of the car on this fatal night with reference to the lights in the store. It is just as plausible to argue that the occupants of the car were on their way to the home of the plaintiff, while it may have been the longer, way, but what mattereth that to youth, as well as it would be to argue that they were going by the store of his mother to see if the lights were out or to a restaurant near by which they frequently visited when out driving. Evidence of facts to establish the relationship of master and servant must be certain so that it may be said that a preponderance of all evidence in the case points to but one conclusion.

We have examined most carefully the evidence bearing upon the question of agency and we are unable to say that such proof has been offered on the part of and by the plaintiff as to sustain the doctrine of agency to authorize a recovery by the plaintiff against the defendant in this case.

When, in the judgment of a reviewing court, after a careful ~~exmain~~ examination of the evidence offered in the trial court upon a vital issue, it is of the opinion that, that issue is not proven by a preponderance of all the evidence upon the question then its ~~p~~plain duty is to so find and to set aside a judgment predicated thereon even though it has been heard and

The evidence bearing upon question of agency is very meager and the best that can be said of it is that it is general in its nature. The evidence discloses that the driver of the car that night was a relative in his mother's phone and many times while out driving at night with the plaintiff in the case, drove by the store and if the lights were burning in the rear he would get out and turn them off and would then go home and tell his mother that he had done so. There does not seem to be in the record any direct evidence as to any duty the driver of the car owed the owner of the car on this fatal night with reference to the lights in the store. It is just as plausible it seems that the occupants of the car were on their way to the home of the plaintiff, while it may have been the longer, way, but that mattereth that to youth, as well as it would be to assume that they were going by the store of his mother to see if the lights were out or to a restaurant near by which they frequently visited when out driving. Evidence of facts to establish the relationship of master and servant must be certain so that it may be said that a preponderance of all evidence in the case points to but one conclusion.

We have examined more carefully the evidence bearing upon the question of agency and we are unable to say that such proof has been offered on the part of and by the plaintiff as to establish the doctrine of agency to authorize a recovery by the plaintiff against the defendant in this case.

Then, in the judgment of a reviewing court, after a careful examination of the evidence [illegible] upon a trial [illegible] by a preponderance of all the evidence [illegible] judgment [illegible]

passed upon by a jury. This is deemed necessary in order to promote justice and its due administration in the courts. Crowder vs. Chicago and Alton, 145 Illinois Appellate at 556; Ball vs. Beckstein 173 Illinois 187; Chicago and Erie R. R. vs Meech 163 Illinois 305.

Other questions are argued; but being of the opinion, as we are, that the plaintiff has not produced sufficient testimony toestablish the question of agency to authorize a recovery, the judgment of theCircuit Court of Winnebago County is reversed and the cause remanded.

REVERSED AND REMANDED.

STATE OF ILLINOIS,
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(65027—1M—9-31)

8534

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 23 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8534 A-14.

IN THE

APPELLATE COURT

OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM A. D. 1932.

PHENIX BANKING COMPANY, INCORPORATED, Appellee, VS. W. W. JONES, Appellant.	Appeal from the Circuit Court of Stark County.

Baldwin, J.

* * * * * * * * *

This case comes here on an appeal from an order of the Circuit Court of Stark County, denying a motion to set aside a judgment confessed in said Court.

On September 5th, 1931, judgment was entered in the office of the Clerk of the Circuit Court in said County, in vacation, in favor of the Appellant for the sum of $2,169.90 and cost of the suit. The judgment note was in usual form and was dated June 1st, 1931, due oneyear after date with interest at 7% per annum from date, interest payable annually, and the judgment included Attorney fees amounting to $197.91 or 10% of the amount due as provided in the note.

Within the time allowed by law, there was notice given to vacate the judgment and an affidavit and motion to vacate filed, motion was denied and appellant took an appeal from the order on this motion.

It appears that the Appellant did not ask, in addition to the vacation of the judgment, for leave to plead, nor did he set up in his affidavit the nature and character of his defense on the merits, if any he had, contenting himself with stating as follows: -- "That he verily believes that the defendant has a good defense and that said judgment is null and void and should be vacated and set aside", and then continuing he sets up that the nature of the defense is that the declaration does not allege a good cause of action; does not state that plaintiff is "holder" of note sued on; that at the time of the judgment there was no interest due; that the Attorney fees are excessive; that the Clerk was without jurisdistion to enter the judgment, and that the Attorney confessing the judgment had no power to confess judgment for the amount nor agree upon the Attorney fees nor that no writ offerror or appeal will be prosecuted, etc.

The declaration filed in this case was in the usual form and set out that the Appellant made the note in question and delivered it to Appellee and the record discloses that Appellee brought suit upon the same against Appellant, which in our judgment clearly disposes of the question in favor of Appellee as to whether or not the declaration alleges that Appellee was the "holder" of the note at the time judgment was confessed. In our judgment it will be conclusively presumed that Appellee, in bringing suit upon the note was the "holder" of the note.

The note contained a clause with reference to interest as follows: -- "Interest payable annually". It is claimed that inasmuch as the note was dated June 1st, 1931, payable one year after date and

Within the time allowed by law, there was notice given to vacate the judgment and an affidavit and motion to vacate filed, motion was denied and accordingly took an appeal from the order on this motion.

It so came that the Appellant did not ask, in addition to the vacation of the judgment, for leave to plead, nor did he set up in his affidavit the nature and character of his defense on the merits, if any he had, contenting himself with stating as follows: — "I do verily believe that the defendant has a good defense and that said judgment is null and void and should be vacated and set aside", and then continuing on with a "for the reasons of the defendant in this indemnity" he set forth a good cause of action; does not state that "plaintiff" is "defendant" at such and on; that at the time of the judgment there was no indemnity; that the indemnity has now matured; that the time was extended; that the defendant is entitled to have the judgment, and that the attorney withdrawing the judgment had no power to enter judgment for the amount his error upon the affidavit does not that he will otherwise be ruined will be groundless, etc.

The decisions filed in this case are in the usual form and set out that the Appellant made the note in question and delivered it to Appellee and the general discharge that Appellee brought with upon the same against Appellant, which in our judgment clearly disposes of the question in favor of Appellee by whether or not the consideration alleged that Appellee was the "holder" of the note at the time judgment was confessed. In our judgment it will be conclusively presumed that Appellee, in bringing suit upon the note was the "holder" of the note.

The note contained a clause with reference to interest as follows: — "Interest payable annually". It is claimed that inasmuch as the note was dated June 1st, 1921, payable one year after date and

interest payable annually, that at the time judgment was entered on September,6th, 1931 there was no interest due.

The note contained a clause authorizing confession of judgment "at any time hereafter for such amount as may appear to be due thereon, together with all costs and 10% Attorney fees".

Our Courts have held that whether the principal is due or not, when the note contains a clause, such as in the instant case, then the judgment can be entered at any time after date of the note for whatever is due on the principal and it follows that interest attaching to the principal to the date of the judgment would necessarily be included in such a grant of power, unless the note by its plain and unambiguous terms would direct otherwise.

It should be noted in passing that the Appellant makes no complaint that there was nothing due on the principal for the same reason he claims nothing due as interest for the note recites that the principal sum is due one year after date; but, as herein pointed out, maturity is accelerated by the clause in the note, and we apply the same rule as to interest.

It appears from the record that the amount of the judgment, including Attorney fees was $2,169.90 and deducting the $197.91 therefrom - the Attorney fees - leaves a remainder of $1971.99 as the amount due including principal of $1936.50 and $35.40 interest from date of the note to the date judgment was taken. The total amount of principal and interest due was $1,971.99 and 10% of this amount or $197.19 was the amount clearly authorized by the note to be confessed as Attorney fees by the Attorney for Appellant. This being a matter of clear calculation, no citation of authority is necessary.

Complaint is made that the Attorney for the defendant below -- the Appellant here -- had no power to sign the cognovit and confess judgment for the amount stated in the record, and that as the note

interest payable annually, that at the time judgment was entered on September,6th, 1931 there was no interest due.

The note contained a clause authorizing confession of judgment at any time hereafter for such amount as may appear to be due thereon, together with all costs and 10% Attorney fees".

Our Courts have held that where the principal is due on demand, then the note contains a clause, such as in the instant case, from the judgment can be entered at any time after date of the note whenever it has on the principal and it "delays" such interest attaching to the principal on the date of the judgment would be included in such a level of costs, unless the note or the claim and nonjudgment issue would direct otherwise.

It should be noted in passing that the Appellant makes no complaint that there was anything due on the principal by the time reason he claims nothing due as interest for the note contains that the principal sum is due one year after date; but, as herein indicated out, maturity is accelerated by the clause in the note, and we apply the same rule as to interest.

It appears from the record that the amount of the judgment, including interest from the 1st,July, and including the $[illegible] attorney fees - the Attorney fee - figures a remainder of $[illegible] as the amount due including principal of $[illegible] and $[illegible] the date of the note to the date judgment was taken. The total amount of principal and interest was $[illegible] and 10% of this amount by $[illegible] was the amount clearly authorized by the note to be considered as Attorney fees by the Attorney for Appellant. This being a matter of clear calculation, no citation of authority is necessary.

Complaint is made that the attorney for the defendant below -- the Appellant here -- had no power to sign the mortgage and enter judgment for the amount stated in the record, and that on the note

did not agree that no writ of error or appeal should be prosecuted that therefore the confession was void.

We have hereinabove decided that the amounts are correct, therefore, that part of the contention must fall.

With reference to the power for the Appellant to consent that no writ of error or appeal should be prosecuted, we find that this Court has heretofore in Long vs. Coffman, 230 Illinois Appellate at Page 527, disposed of this contention and reference thereto may be had on that point.

To the final contention of Appellant that the Clerk had no authority to do what was done in this case, we have only to repeat what was also said in the Long vs Coffman Case, (supra), that, -- "The Clerk of the Court is not called upon to exercise judicial powers in entering judgment on a note by confession during vacation ***since it is his mandatory duty to file the papers and enter judgment upon presentation to him of purported declaration, warrant of Attorney, cognovit and supporting affidavits without questioning the legal sufficiency of suchpapers".

It appears that while this appeal was pending, a Receiver was appointed for Appellee and a proper motion made in apt time to substitute the name of Receiver fotrthat of Appellee.

This motion upon consideration thereof by the Court is allowed and the Clerk is and he is hereby directed to substitute the name of the Receiver for that of the Appellee in this proceeding.

In this view of the law, as applied to this case, this Court affirms the judgment in the lower Court in denying the motion.

AFFIRMED.

did not agree that on writ of error or appeal should be dismissed that therefore the confession was void.

In Lane hereinabove decided that the amounts are concrete, therefore, that part of the proceeding was full.

This reference in its terms for the application I feel that on with of error or appeal should be prosecuted, we find that the Court has heretofore in Long vs. Coffman, 280 Illinois 5 reflecte at page 327, discussed of this contention and references thereto may be had as that point.

To the final contention of Appellant that the Clerk had no authority to do what was done in this case, we have only to repeat what was also said in the Brief as follows that, (quote), that, -- "The place of the Court is not called upon to exercise judicial power in entering judgment in a case or proceeding during vacation" -- nor is the Clerk authorized to file the proper and entire judgment upon presentation to him of properly authenticated, signed of attorney, composit and supporting affidavits without questioning the legal sufficiency of judgment".

In conclusion this will be this second was proceeding, a temporary was appointed for Appellant and a proper motion made in his time to dis-estimate the order of temporary injunction or injunction.

This motion upon reasonableness filed by the Court is filed and the Clerk is not by in Bender Counsel to substitute the case of the Supreme Ct. that of the Appellee in 5/2 proceeding.

In this view of the law, as applied to this case, this Court affirms the judgment in the lower court in denying the motion.

AFFIRMED.

STATE OF ILLINOIS,
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31) 7

8554

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.
Hon. JAMES S. BALDWIN, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8554 Agenda No. 20

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM A. D. 1932

Alexander Lumber Company,

a corporation,

Appellant,

vs.

John C. Coberg, Board of Education, School District No. 46, Du Page County, Illinois, et al

Appellees,

and

Hammerschmidt & Franzen Company, a corporation (Intervening Petitioner),

Appellant,

Appeal from Circuit Court of Du Page County.

BALDWIN, J.

A bill of complaint was filed by the appellant in the Circuit Court of Du Page County to the October Term 1929 in which it was alleged that the complainant was a corporation doing business at Aurora and Glen Ellen, Illinois, buying and selling lumber and building materials.

That the Board of Education of School District No. 46 of Du Page County, Illinois, entered into a contract on or about October 1, 1928 with one John C. Coberg to furnish labor and materials for the erection of a school building in the City of Elmhurst to be known as Washington School, and for another school building known as Hawthorne School, and that thereafter said Coberg entered into an agreement with one William J. McDonald to furnish certain labor and materials to be used in each of the said buildings.

That thereafter the said McDonald entered into a contract

with the complainant for the purchase of certain building materials to be ordered from time to time and to be used in the construction of the said Washington and Hawthorne School buildings, to be paid for at the usual and customary price at the time and place the material was delivered and further alleged that the complainant would deliver to the said McDonald building materials for the Washington School to the amount of $1,583.62 and materials for the Hawthorne School to the amount of $565.05.

That before payment was made by the school district to the said Coberg and McDonald, the complainant notified the officials of said School District No. 46 of its claim for materials so furnished on the two school buildings by written notice served on February 9, 1929 and September 3, 1929 respectively and claimed a lien upon all of the moneys, bonds and warrants in possession of the School District held for the payment of the contracts for the building of such school buildings. It further alleged repeated demands and refusals to settle and adjust the account.

It was also alleged that the Pittsburgh Plate Glass Company had or claimed some interest in and to the moneys, bonds and warrants and property of said School District but asserted that such claim, if any, was subsequent to the lien of the complainant.

Copy of the notices referred to in the bill of complaint were attached to the bill as Exhibits A, B and C.

One Hammerschmidt and Franzen Company filed its intervening petition, asserting that it was engaged in the manufacture of mill work, etc., and that it entered into a contract with the said McDonald to furnish all labor and materials to be used in the erection of said school, to the amount of

...,

with the complainant for the purchase of certain building materials to be ordered from time to time and to be used in the construction of the said Washington and Jefferson School buildings, to be paid for at the usual and customary price at the time and place the material was delivered and further alleged that the complainant would deliver to the said McDonald building materials for the Washington School to the amount of $1,885.89 and materials for the Jefferson School to the amount of $806.05.

That before payment was made by the school district to the said Coberg and McDonald, the complainant notified the officials of said School District No. 46 of its claim for materials so furnished on the two school buildings by written notice served on February 9, 1928 and September 8, 1928 respectively and claimed a lien upon all of the money, bonds and warrants in possession of the said School District for the payment of the contracts for the building of such school buildings. It further alleged [illegible] to settle and adjust the account.

It was also alleged that the Fidelity Title Trust Company had or claimed some interest in and to the money, bonds and warrants and property of said School District and asserted that such claim, if any, was inferior to the lien of the complainant.

Copy of the notices referred to in the bill of complaint were attached to the bill as Exhibits A, B and C.

The Commissioner and Trustee Company filed the answering petition, asserting that it was engaged in the manufacture of mill work, etc., and that it entered into a contract with the said McDonald to furnish all labor and materials to be used in the erection of said school, to the amount of

$1,483.30 and claimed a lien therefor and prayed that an accounting be taken under the direction of the court and that the school board might be ordered to pay it the sum due it.

The Pittsburgh Plate Glass Company filed its answer and likewise its cross bill. The Board of Education of the School District No. 46 filed its answer and admitted the making of the contract with Coberg for the two buildings known as Washington and Hawthorne Schools and asserted that it still had in its possession on account of the contract the sum of $1,869.46 from the Washington School and $2,062.17 from the Hawthorne School and that it was ready to pay the same to whomsoever the court might direct.

And answer denied that it had any knowledge of the contract between Coberg and McDonald or between McDonald and ~~that~~ the complainant and by order of court such answer was permitted to stand as the answer to the intervening petition of Hammerschmidt and Franzen Company.

The defendant, Coberg, filed his answer and admitted the making of the contracts with the said Board of Education but denied that McDonald was a co-partner in any transaction whatever and asserted that the said McDonald was a sub-contractor of the defendant in said work in the bill of complaint referred to and that as such sub-contractor the said McDonald had been paid by the defendant all moneys due him upon all of said work referred to in the bill of complaint, and denied any knowledge of delivery of materials by complainant upon the premises as alleged in the bill of complaint. Defendant Coberg likewise filed a like answer to the intervening petition of Hammerschmidt and Franzen Company.

William J. McDonald filed no answer and was defaulted by the court.

$1,885.00 and claimed a lien therefor and prayed that an accounting be taken under the direction of the court and that the school board might be ordered to pay it the sum due it.

The Pittsburgh Plate Glass Company filed its answer and likewise its cross bill. The Board of Education of the School District No. 4a filed its answer and admitted the making of the contract with Coberg for the two buildings known as Washington and Hawthorne Schools and asserted that it still had in its possession on account of the contract the sum of $1,885.44 from the Washington School and $3,088.17 from the Hawthorne School and that it was ready to pay the same to whomsoever the court might direct.

And answer denied that it had any knowledge of the contract between Coberg and McDonald or between McDonald and the complainant and by order of court such answer was permitted to stand as the answer to the intervening petition of Hammermeister and Freeman Company.

The defendant, Coberg, filed his answer and admitted the making of the contracts with the said Board of Education but denied that McDonald was a co-partner in any transaction whatever and asserted that the said McDonald was a sub-contractor of the defendant in said work in the bill of complaint referred to and that as such sub-contractor the said McDonald had been paid by the defendant all moneys due him upon all of said work referred to in the bill of complaint; and denied any knowledge or delivery of materials by complainant upon the premises as alleged in the bill of complaint. Hammermeister Coberg Lyverse filed a like answer to the intervening petition of Hammermeister and Freeman Company.

William J. McDonald filed an answer and was defaulted by the court.

The case was referred to the Master in Chancery, who took the proof and filed his report herein finding that the sums claimed by the respective companies to be due was true and that the materials had been furnished, but finding that under the statute concerning liens the material men were not entitled to a lien upon the moneys in the hands of the School Board.

There is practically no controversy as to the facts in this case. The material men unquestionably furnished the materials to the said McDonald, sub-contractor, and such materials were unquestionably used in the erection of the building. Thus the sole and only question to be determined in this case is: "Are the material men who furnished materials to a sub-contractor entitled to a lien upon the moneys, bonds, warrants, etc., in the hands of the School Board?"

Section 23 of Chapter 82 Cahill's Revised Statute (1931) provides that "any person who shall furnish material, aparatus, fixtures, machinery or labor to any contractor having a contract for public improvement for any county, township, school district, city or municipality in this State, shall have a lien on the money, bonds or warrants due or to become due such contractor under such contract, provided such person shall, before payment or delivery thereof is made to such contractor, notify the official or officials of the county, township, school district, city or municipality whose duty it is to pay such contractor, of his claim by a written notice, etc." This section does not provide for a lien upon the improvement or the property improved, but only gives the sub-contractor or claimant a lien upon the money, bonds or warrants due or to become due the contractor. (Alexander Lumber Co. vs. Farmer City, 272 Ill. 264).

It is contended by the appellee that this act does not

The case was referred to the Water in Memory, the tool-
proof and filed his report herein [illegible] that the [illegible]
claimed by the respective companies to be due was [illegible] that
the materials had been furnished, but finding that under the
statute concerning liens the material men were not entitled to
a lien upon the moneys in the hands of the School Board.

There is practically no controversy as to the facts in
this case. The material men unquestionably furnished the
materials to the said McDonald, sub-contractor, and such
materials were unquestionably used in the erection of the
building. Thus the sole and only question to be determined
in this case is: "Are the material men who furnished materials
to a sub-contractor entitled to a lien upon the moneys, bonds,
warrants, etc., in the hands of the School Board?"

Section 53 of Chapter 88 Cahill's Revised Statute (1921)
provides that "any person who shall furnish material, apparatus,
fixtures, machinery or labor to any contractor having a contract
for public improvement for any county, township, school district,
city or municipality in this state, shall have a lien on the
money, bonds or warrants due or to become due such contractor
under such contract, provided such person shall, before payment
or delivery thereof is made to such contractor, notify the
official or officials of the county, township, school district,
city or municipality whose duty it is to pay such contractor,
of his claim by a written notice, etc." This section does not
[illegible] a lien upon the [illegible]
[illegible] but only gives the sub-contractor [illegible]
upon the money, bonds or warrants due or to become due the
contractor. (Bittenbender Lumber Co. vs. Tacoma City, 27 Ill.
[illegible]).

It is contended by the appellee that [illegible]

include material men who furnish materials to a sub-contractor but that it only includes such persons who furnish labor or materials directly to the contractor who made the original contract with the school board. On the other hand the appellant insists that such construction is not the correct construction of the act and that such act does include material men who furnish materials to a sub-contractor.

This same contention was made in the case of Granite City Lumber and Coal Company vs. Board of Education, 203 Ill. App. 134. In that case the School Board entered into a contract with one J. R. Beale for the construction of a certain high school building. Thereafter Beale entered into a contract with Mettlen and Company for certain brick work and the materials therefor. Mettlen and Company in turn entered into a contract with the Granite City Lumber and Coal Company for the purchase of materials. This company supplied the materials and upon failure of the sub-contractor, Mettlen and Company, to pay for the same the Granite City Lumber and Coal Company claimed a lien upon the moneys in the hands of the School Board for the value of the materials furnished.

Thus it was there contended exactly as is contended here, namely, that persons furnishing materials to a sub-contractor were not within the terms of the act above referred to, and in passing upon the question the court said (page 140); "The section of the statute referred to does not require that the material shall be furnished upon the contract of the principal but applies to any person who may furnish material or labor to any contractor for any public improvement, and it seems to us that if we should say that before a person furnishing material should have an agreement with the contractor, that it would be a narrow construction of this

includes material men who furnish materials to a sub-contractor but that it only includes such persons who furnish labor or materials directly to the contractor who made the original contract with the school board. On the other hand the appellant insists that such construction is not the correct construction of the act and that such act does include material men who furnish materials to a sub-contractor.

The same contention was made in the case of Smallin City Lumber and Coal Company vs. Board of Education, 80 Ill. App. 124. In that case the Board of Education had a contract with one J. E. Smith for the construction of a certain high school building. Thereafter Smith entered into a contract with Mattson and Company for certain brick work and the materials therefor. Mattson and Company in turn entered into a contract with the Granite City Lumber and Coal Company for the purchase of materials. This company supplied the materials and upon failure of the sub-contractor, Mattson and Company, to pay for the same the Granite City Lumber and Coal Company claimed a lien upon the moneys in the hands of the School Board for the value of the materials furnished.

This is the same contention which is in this case, namely, that persons furnish materials to a sub-contractor were not within the terms of the act above referred to, and in passing upon the question the court said (page 140): "The section of the statute referred to does not require that the material shall be furnished upon the contract of the principal but applies to any person who may furnish material or labor in any contract for any public improvement, and it seems to us that if we should say that before a person furnishing material should have an agreement with the contractor, that it would be a narrow construction of this

statute. While it has been said by the Supreme Court that this statute is in derogation of the common law and should be strictly construed, yet we do not believe that such a construction should be adopted as would deprive one of a remedy for the materials furnished and used in the erection of the building, if the proper notices have been given, as the statute itself by Section 53 (J. & A. Section 7177) provides: 'This act is and shall be liberally construed as a remedial act.' The object and purpose of the lien law is to protect those who in good faith furnish materials for the construction of buildings, and such persons ought not by a strict construction be deprived of this remedy." To like effect is the case of City of Staunton vs. Cole & Fauber, 254 Ill. App. 377; Siemer Milling Co. vs.Moritz, et al, 227 Ill. App. 459; Alexander Lumber Co. vs. Farmer City, 272 Ill. 264; McMillen vs. Casey Co. 311 Ill. 584; Acker vs. Vanderboom, 235 Ill. App. 417.

The rule of construction as determined in the case above mentioned is applicable to and decisive of the case at bar. We hold that the appellants are entitled to a lien, to the extent of their respective claims, as proven herein, upon the moneys, bonds or warrants due or to become due to the said John C. Coberg from the Board of Education of School District No. 46, Du Page County, Illinois.

Other questions have been presented herein, but from the conclusion we have reached we deem it unnecessary to discuss them. The decree of the Circuit Court entered herein is erroneous and must be reversed.

The decree of the Circuit Court of Du Page County is reversed with directions to enter a decree holding that the

[illegible] while it has been said by the supreme Court that the statute is in derogation of the common law and should be strictly construed, yet we do not believe that such a construction should be imposed as would convert one of a remedy for the wrongful withholding and use in the execution of the building, if the proper notices have been given, to the statute itself by section 8C (3. & 4. Geo. V1C7) provides: 'This act is and shall be liberally construed as a remedial act.' The object and purpose of the lien law is to protect those who in good faith furnish materials for the construction of buildings, and such persons ought not by a strict construction be deprived of this remedy." To like effect in the case of City of Edmonton vs. Cole & Hauser, 1[illegible] [illegible]. App. 1[illegible]; Steam Shipping Co. vs.Morris, et al, 1[illegible] [illegible]. App. 1[illegible]; Alexander Lumber Co. vs. Tanner City, 1[illegible] [illegible]. 1[illegible]; [illegible] vs. [illegible], [illegible] [illegible]. 1[illegible]; [illegible] vs. [illegible], [illegible] [illegible]. App. 1[illegible].

The rule of construction as determined in the case above mentioned is applicable to and decisive of the case at bar. We hold that the appellants are entitled to a lien, [illegible] the return of their respective claims, as [illegible] upon the money, [illegible] or [illegible] to become [illegible] to the land [illegible]. Appeal from the Judge of Execution of Judicial District [illegible], Alberta, by [illegible] County, Alberta.

Other questions have been presented [illegible]. But from the conclusion we have reached we feel it unnecessary to discuss them. The decree of the Chancery Court should [illegible] in accordance herewith.

The decree of the Chancery Court [illegible] is reversed with directions to enter a decree holding that the

respective appellants are entitled to and have liens upon the moneys, bonds or warrants in the hands of the Board of Education of School District No. 46, Du Page County, Illinois, due or to become due to John C. Coberg to the extent of their respective proven claims.

REVERSED WITH DIRECTIONS.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31) 7

858v

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 22 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8582 Ag. No. 28

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A. D. 1932.

ELMER BENSON, (Plaintiff below)
Appellee,
vs.
WALTER HOCHSPRUNG and ALBERT HOCHSPRUNG, individually and as co-partners doing business as Walter Hochsprung, or Hochsprung Brothers, (Defendants below)
Appellants.

Appeal from the City Court of Aurora, Kane County, Illinois.

WOLFE, P.J.

Elmer Benson, the appellee, brought suit in the City Court of Aurora, in Kane County, against the defendants for injuries that he sustained in a collision between a taxicab in which he was riding and a truck owned by the defendants.

Benson, who is a taxicab driver, was riding in a taxicab of a different company than the one for whom he was working. At the time of the accident he was on his way home when the taxicab in which he was riding collided with the truck of the defendant.

The first count of the declaration charges the defendants with general negligence. The second count charges a violation of the Motor Vehicle Act, in regard to the right-of-way at a crossing upon a public highway. The third count charges the defendant with driving his truck at a dangerous and reckless rate of speed. The fourth count charges that the driver of the truck did not give any warning of its approach to the intersection, etc. The fifth count charges the defendants with 'wilful and wanton operation of the truck.' The only plea of the defendant was one of 'not guilty.'

The case was tried before a jury and they were unable to agree. The case was again submitted to a jury at a later term

OCTOBER TERM, A. D. 1926.

Appeal from the City Court of Aurora, Kane Co. No.

vs.

WALTER HOEKSTRA and WILLIAM HOEKSTRA, individually and as co-partners doing business as Walter Hoekstra, or Hoekstra Brothers, (Defendants below appellees.

MR. J. J.

Elmer Benson, the appellee, brought suit in the City Court of Aurora, in Kane County, against the defendants for injuries that he sustained in a collision between a taxicab in which he was riding and a truck owned by the defendants.

Benson, who is a taxicab driver, was riding in a taxicab of a different company than the one for whom he was working. At the time of the accident he was on his way home when the taxicab in which he was riding collided with the truck of the defendants.

The first count of the declaration charges the defendants with general negligence. The second count charges a violation of the Motor Vehicle Act, in regard to the rights-of-way at a crossing upon a public highway. The third count charges the defendant with driving his truck at a dangerous and reckless rate of speed. The fourth count charges that the driver of the truck did not give any signal of his approach or his intersection, etc. The fifth count charges the defendants with 'willful and wanton operation of the truck.' The only plea of the defendant was one of 'not guilty.'

The case was tried before a jury and they were unable to agree. The case was again submitted to a jury and a verdict

of court, who found the defendants guilty and assessed plaintiff's damages at $2,000.00. After a motion for a new trial and arrest of judgment were overruled, judgment was entered on the verdict for the plaintiff in the sum of $2,000.00. The defendants bring the case to this court on appeal.

The appellee testified that after he finished work for the taxicab company he got into the taxiwhich the witness Browning was driving. He further testified that he told Browning to take him home; that he paid the regular fare of fifty cents to Browning; that he sat in the front seat with Browning and paid no attention to the operation of the taxi; that he was arranging his report for his previous night's work with the intention of turning it into his company the next evening when he started to work again; that while he was so engaged on this work the accident happened and he was injured; that he was taken to the hospital and there treated for his injuries. The witness Browning corroborates the appellee in his testimony relative to him becoming a passenger in the taxi and how the accident occurred, and what the appellee was doing at the time of the accident. Browning also told in detail how the accident occurred, the rate of speed of the cars, the condition of the street, and the position of the cars after the accident.

The appellee called quite a number of witnesses who testified that they saw the accident occur and who gave their version of the same. The appellant called a number of witnesses who had seen the cars prior to the accident, but only one witness, the driver of the truck, who was one of the defendants, testified to actually seeing the collision. Under these circumstances it is particularly the province of the jury to say how the accident occurred and decide the issues of fact between the parties. Unless this court can say that the verdict is manifestly against the weight of the evidence we will not be justified in setting the verdict aside as being contrary to the evidence.

[illegible] who found the defendants guilty and assessed plaintiff's damages at $2,000.00. [illegible] motion [illegible] arrest of judgment were overruled, judgment was entered in the verdict for the plaintiff in the sum of $2,000.00. [illegible] bring the case to this court on appeal.

The appellee testified that after he [illegible] the taxicab company he went into the washroom [illegible] was driving. He further testified that he told [illegible] him home; that he paid the regular fare of fifty cents [illegible] time; that he met in the front seat with [illegible] attention to the operation of the taxi; that he was [illegible] turning it into his company the next evening when he [illegible] work again; that while he was so engaged in this work the accident happened and he was injured; that he was taken [illegible] and there treated for his injuries. [illegible] examination the appellee on his testimony relative to his [illegible] a passenger in the taxi and how the accident occurred, and what the appellee was doing at the time of the accident. [illegible] also like to direct the attention of the court to [illegible] of the case, the [illegible] of the driver, but the testimony of the [illegible] made after the accident.

The appellee relied upon a number of statements [illegible] that the accident occurred and [illegible] the case. The appellant relied on a number of statements [illegible] there prior to the accident, but only one witness, the driver of the taxi, who was one of the defendants, testified to actually seeing the collision. Both these witnesses in a particularly [illegible] the previous of the part to say to the accident occurred and [illegible] the issues of fact between the parties. Neither this court nor [illegible] that the results in substantial justice [illegible] are will not be justified in setting the verdict aside [illegible] material to the problem.

The appellants offered no evidence whatsoever to contradict the testimony of the appellee and the witness Browning, that the appellee was a passenger for hire in the taxicab of Browning. From the evidence introduced it seems to us there could be no question but that the appellee was a passenger for hire and that the taxi in which he was riding was a common carrier. Under such circumstances it was not necessary that the appellee exercise that degree of care that is required of one who is a guest in an automobile, as he has a right to rely upon the skill and experience of the driver of the taxicab, trusting that he will so operate his taxi in such a manner that one will not be injured through his negligence.

Over the objections of the defendants the court permitted the appellee to introduce a bill which had been rendered him by the St. Charles Hospital for services due to the accident. This bill was known as Exhibit One. Exhibit Two was a bill for medical attention to appellee at the hospital. Exhibit Two was for the services of Dr. E. R. Balthazer. Dr. Balthazer testified for the appellee that he treated him for the injury in question, but did not testify that his charges were the ordinary and reasonable charges for like services as rendered in the bill. The appellants now insist that this was error to admit these bills in evidence without further proof that they were reasonable and necessary in attending to the injuries of the appellee. In the case of Wicks vs. Cuneo-Henneberry Co., 319 Ill., 344, the courts say: "The payment of the bill of the physician is prima facie evidence that it is reasonable." We find no authority that a bill rendered by a hospital to a patient is a fair and reasonable amount for the services rendered. Our courts have repeatedly held that in suits for damages to an automobile that a bill from a regular garage for repairs to the automobile is prima facie evidence that the bill is correct. -Cloyes vs. Plaatje, 231 Ill., App. 183; Wholesale Grocery Corporation v. Richheimer Brokerage Co., 233 Ill., App. 64.

The appellants offered no evidence whatsoever to contradict the testimony of the appellee and the witness Jones, and the appellee was a passenger for hire in the business of carrying. Now the evidence introduced it seems to me should be in question but that the appellee was a passenger for hire on the road the bridge in which he was riding was a common carrier. Under such circumstances it was not necessary that the appellee exercise that degree of care that is required of one who is a guest in an automobile, or he has a right to rely upon the skill and experience of the driver of the taxicab, knowing that he will so operate the road in such a manner that one will not be injured through his negligence.

Over the objections of the defendants the court permitted the appellee to introduce a bill which had been rendered him by the Marion Hospital for services due to the accident. This bill was known as Exhibit One. Exhibit Two was a bill for medical attention to appellee at the hospital. Exhibit Two was for the services of Dr. E. R. Dalthmer. Dr. Dalthmer testified for the appellee that he treated him for the injury in question, but did not testify that the charges were the ordinary and reasonable charges for like services as rendered in the bill. The appellants now insist that this was error to admit those bills in evidence without further proof that they were reasonable and necessary in attending to the injuries of the appellee. In the case of Wabash vs. Chase-Hornsberg Co., 219 Ill., 544, the court says: "The payment of the bill of the physician is prima facie evidence that it is reasonable." We find no authority that a bill rendered by a hospital to a patient is a fair and reasonable amount for the services rendered. Our courts have repeatedly held that in suits for damages to an automobile that a bill from a similar garage for repairs to the automobile is prima facie evidence that the bill is correct. Gilpes vs. Ehrlich, 221 Ill., 484; Indianapolis Gasoline Motor Co., 221 Ill., 81.

In principle we can see no distinction between bills for doctors' services, hospital services, and repair for automobiles. We think the court properly held that the introduction of these bills were prima facie evidence that they were correct.

At the request of the appellee the court gave to the jury the following instruction: "The court instructs the jury as a matter of law where several persons are involved in an automobile collision that the plaintiff has the right to bring suit against one, any, or all of the persons involved." The appellants cite no authority to sustain their contention that this is not the law. That this instruction properly states the law is borne out by the case of W. St., St. L & P. RR v. Shacklet, 105 Ill. 364.

The appellant also insists that the court erred in giving instruction No. 3. Their criticism is that the court erred in assuming that the appellee was a passenger in the taxicab. The evidence is uncontradicted that when the appellee, or shortly after the appellee entered the taxicab in question, he paid the driver of the taxicab fifty cents for his fare. Where the question of fact is not disputed and no circumstances in the evidence to contradict the testimony of the witness, the court has a right to assume that such facts exist. - O'Rourke v. Sproul 241 Ill. 576; Schultz v. Schultz 229 Ill. 427.--

In the case of the Chicago City R.R. Co., v. Carroll, 206 Ill., 318, the court say: "There was a prima facie showing by the appellee that the appellant company operated the railroad which injured the appellee, and there was no evidence tending to contradict it, and it is not error to assume in an instruction that which is established on one side and not denied on the other."

It is our opinion that this instruction properly stated the law. We do not find any reversible error in the case and the judgment of the City Court of Aurora is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31) 7

8435

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 23 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8465

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.

Maxcy-Barton Organ Company,
Appellant

vs.

Appeal from the County Court
of DuPage County.

Glen Building Corporation,
Appellee.

BALDWIN, J.

This case is an appeal from a statutory trial of the right of property. It was before this Court on a former occasion and an opinion was filed. A petition for a re-hearing was granted. The respective parties have re-argued the cause, and it was again submitted to the Court for decision.

The pleadings consisted of a notice by Maxcy-Barton Organ Company to the Sheriff of DuPage County, claiming the ownership of a theatre organ with attachments, on which the Sheriff of DuPage County had levied an execution on a judgment obtained by Glen Building Corporation against McLaughlin and Michalopoulos, the owners of the theatre in which the organ was located, and the customary notices by the sheriff to the Judge of the County Court and by the clerk of the County Court to the judgment creditor.

The claimant corporation, appellant (hereinafter called the plaintiff) is a Wisconsin corporation, formerly known as Bartola Musical Instrument Company, but which, after the conditional sale of the organ herein mentioned, and before the commencement of the suit, changed its name to Maxcy-Barton Organ Company. Plaintiff, on or about June 11, 1926, sold to W.D. McLaughlin and John Michalopoulos a theatre organ for the total price of $12,000, payable $1,200 in cash, $1,200 upon installation, and the remainder in a series of notes of $200 each for twelve months,

$250 each for twelve months, $300 each month for five months and $2,700 in the thirtieth month. The sale was evidenced by a conditional sales contract, reserving title to the organ in the seller until the purchase price should be fully paid. McLaughlin and Michalopoulos were residents of Cook County and not of DuPage County. McLaughlin and Michalopoulos paid under this contract a total of $5,500 in installments, substantially as provided in the conditional sales contract, the last payment of $250 having been made December 6, 1928.

In May, 1931, Glen Building Corporation, having procured a judgment against McLaughlin and Michalopoulos, levied it on sundry property in the theatre occupied by the judgment debtors, including the organ and accessories herein involved. Plaintiff filed its claim of right of property in the organ and accessories, relying on its title under the conditional sales contract.

The trial court held that the right of property was in McLaughlin and Michalopoulos, and that the property was subject to the levy, and ordered the sheriff to proceed with the sale of the property under the execution.

The plaintiff contends, that,

1. The trial court erred in holding the title to the property to be in McLaughlin and Michalopoulos, since the undisputed evidence showed title in the plaintiff, and delay in enforcing its rights could neither take away plaintiff's title nor estop plaintiff from asserting its title as against an execution creditor.

2. The trial court erred in permitting improper cross examination of plaintiff's witnesses and in admitting incompetent and improper evidence offered by the defendant; and there is no competent evidence in the record of the, existence, contents, execution, or acceptance of any chattel mortgage given by McLaughlin and Michalopoulos to the plaintiff.

3. If there was evidence of the existence and contents of the alleged chattel mortgage the facts shown did not constitute a waiver or abrogation of the reservation of title in the conditional sale contract, or create a transfer of the title to the judgment debtors.

The defendant claimed that by the delay in enforcing the provisions of the conditional sale agreement, after default by McLaughlin and Michalopoulos, the plaintiff had lost its rights thereunder as against an execution creditor, and that subsequent to the date of execution and delivery of the conditional sales contract McLaughlin and Michalopoulos gave the plaintiff a chattel mortgage on this organ and sundry extensions, which chattel mortgage was void by reason of sundry defects, and that the plaintiff was prevented by reason of its alleged acceptance of the chattel mortgage from relying on its title under the conditional sales contract, and that its rights under the alleged chattel mortgage were inferior to those of the levying creditor by reason of the defects of such chattel mortgage.

It is further contended by defendant that plaintiff failing to submit any propositions of law to the trial court can not now claim that the trial court erred in applying legal principles to the evidence, and that there is no evidence in the record to identify the property levied upon.

There is no merit in the contention that the plaintiff did not prove or identify the organ as being its property.

An examination of the record discloses that it was identified as being the only organ in the theatre and was the one sold by plaintiff to the execution-debtor.

Plaintiff sold this organ to the execution-debtors in June, 1926, under what is called a conditional sales contract, and there is no question but that the purchase price has not been paid and that the purchasers have been in default since December 6, 1928. The conditional bill of sale had this provision in it:---

> "Said second party further agrees that it will execute and deliver such other and further papers as may be proper or necessary to give full legal force and protection hereto in said State where such instrument is to be installed."

As to the question raised by defendant that no propositions of law were furnished the trial court, we think a sufficient answer is found to this contention in P.C.C. & St. L. R. Co., v. Chicago City Railway Company, 300 Ill. 162, where it was said:

> "The Appellate Court cannot decline to consider the merits of a suit at law tried without a jury merely because no propositions of law were submitted to the trial court, as the decision of the trial court as to the sufficiency of the evidence is not final and binding on the Appellate Court in such case even though no question of law was raised in any manner."

On the trial of this cause the court permitted certain cross examination of plaintiff's witness, Barton, which is claimed is error. He testified on direct examination for the plaintiff with reference to the change of name of plaintiff from that of Bartola Musical Instrument Company to Maxcy-Barton Organ Company, and in relation to plaintiff's exhibit 2 for identification, which was the conditional sales agreement, identifying the signatures thereto; that the contract was delivered at or about its date; that the organ referred to in the contract is the one now in the theatre; that he superintended the installation of it and that the amounts provided in the contract have not all been paid; that only $5,500.00 had been paid and that no one but McLaughlin and Michalopoulos had paid anything thereon; he detailed the dates and amounts of the payments.

On cross examination defendants sought to examine him with reference to an alleged chattel mortgage and notes, which, it is claimed, were subsequently executed by the parties, who purchased the organ, and delivered to the plaintiff, which was objected to by the plaintiff; but the Court permitted him to answer.

This was clearly error on the part of the lower Court, as nothing had been testified to by this witness in his examination in chief which would have been made properly the basis of such

cross examination by the defendant, and all of that evidence should not have been received and should be stricken. This seems so clear to us that it seems unnecessary to cite authority therefor.

The same witness, Barton, was called as a witness on behalf of the defendant and he was interrogated by defendant's counsel concerning an alleged chattel mortgage and notes secured thereby, claimed to have been executed by McLaughlin and Michalopoulos on this organ and delivered to plaintiffs, and as to the contents of these instruments and as to where these instruments were, and he stated that thirty notes had been given aggregating $10,600.00, and the notes were secured by a chattel mortgage on the organ, all of which were conclusions of his and were improper. He further testified in chief that the notes, mortgages, etc., were sent to one of the attorneys for plaintiff ~~in~~ a few days before this trial and that following the execution of the chattel mortgage it was filed for record in DuPage County and subsequently an affidavit extending the time was filed and later another agreement was filed and recorded, but, upon cross examination he said that he was not at Oshkosh when the documents were mailed, if at all, and that he had no personal knowledge of whether they were mailed or not and the Court thereupon struck from the record his testimony upon those points; then the witness was recalled by the defendant and in the midst of his direct~~ex~~ examination, on being recalled, the following occurred: (Abs. 16-17).

"Mr. Hadley: That is all. Now, I call on the plaintiff in this case, its attorneys and its representatives, to produce on the trial of this cause the notes so given for this organ with the chattel mortgage. On their failure so to do we will introduce secondary evidence to the contrary.

Mr. Robertson: There has been no notice produced, no document served on us, your Honor.

Mr. Hadley: I am now giving you notice, making it oral. Have you the notes and the chattel mortgage?

Mr. Robertson: Here?

Mr. Hadley: Yes.

Mr. Robertson: No.

Mr. Hadley: Will you produce them?

Mr. Robertson: I haven't them here.

Mr. Hadley: That is not the question I asked.

Mr. Robertson: Well, I think probably the Court will take judicial notice, you have ten days in which to serve a legal notice. If you will put me on the stand I will testify.

Mr. Hadley: You are representing the plaintiff, failure on your part to produce them is a refusal on behalf of the plaintiff.

Mr. Robertson: I have no documents such as you describe in the court room or any place in the county.

Mr. Hadley: That is not the question I asked.

Mr. Robertson: You asked me to produce something that is not here.

Mr. Hadley: I asked you if you would produce them.

Mr. Howe: When?

Mr. Hadley: I didn't put any limitation on it.

Mr. Howe; Do you want to?

Mr. Hadley: It will all depend upon his answer.

The Court: Well, failure to produce them, why, of course, secondary evidence will be admitted."

The record here discloses that no notice in apt time was given plaintiff to produce the alleged chattel mortgage and notes. See Conover vs. B. & O. S. W. R. Co. 212 Ill. App. 29; Young v. People 221 Ill. 51, which are cited herein for the purpose of showing that a reasonable notice should have been given plaintiff to produce the documents in question before it would be proper to offer secondary evidence of their contents.

With this alleged foundation, defendant then proceeded to offer in the evidence the original records of Dupage County, showing that on certain dates and in certain books and pages in the Recorder's office of that County there was recorded a certain chattel mortgage given by McLaughlin and Michalopoulos upon this organ;

also certain affidavits purporting to be extensions of this mortgage made on the 8th day of October, 1929 and January 26, 1931, respectively, and over the objection of plaintiff the court received these records in evidence. Plaintiff objected to the introduction of these records on the ground that there was no sufficient foundation laid for the secondary evidence, no notice to produce the same had been given prior to the time of the trial; no evidence showing that the instrument had been destroyed; that original records of public officials are not admissable, the only proper proceeding being a certified copy of what the record shows, and further that it has been shown by the evidence in the case that the signers of the purported chattel mortgage were not residents of DuPage County and therefore the recording of the mortgage in DuPage County under such circumstances, the property mortgaged being in DuPage County, was not required by law, and the instrument itself and the record thereof in DuPage County were nullities.

We are of the opinion that these records should not have been received in evidence.

In addition to the fact that no proper notice was served on plaintiff to produce the originals, which were not shown to have been destroyed, it appears from the evidence that the persons executing this chattel mortgage, upon the date thereof, were residents of the County of Cook and the property sought to be covered by the alleged chattel mortgage was located in the County of DuPage. The Statute requires in such cases, that chattel mortgages in order to be valid, must be filed in the County where the mortgagors reside; unless the mortgagor is a non-resident, then it should be filed in the County where the property is situated. (Smith-Hurd 1931 Illinois State Chapter 95 Section 4.) The recordation of the mortgage and any purported extension or agreements thereunto appertaining in DuPage County was of no avail and not required by law, and therefore should not have been permitted in evidence. (2nd National Bank v. Thuet 124 Ill. App. 501). See

also Smith-Hurd 1941 Illinois Statute Chapter 95 Section 6, which provides that only copies of mortgages or affidavits certified to by the proper Recorder may in some instances be received in evidence, therefore, the Court below clearly erred in admitting in evidence the records of this purported chattel mortgage and the affidavit of extension and contract above referred to.

As to whether or not the contention of defendant that when plaintiff took the chattel mortgage on this property, if it did do so, it, the plaintiff, acknowledged to the public that the title was in the purchaser and would therefore be estopped to deny that title was not in purchasers, we do not now undertake to decide, as we think the evidence concerning this chattel mortgage was improperly admitted, and in the view we take of the matter, that question is not now properly before us for decision.

A more serious question arises in this case as to the failure of the plaintiff to take possession of the property under the conditional bill of sale, after the purchasers were in default in payments for more than two years, and by such conduct caused the public to believe that the purchasers were the owners of the property and therefore were estopped from asserting title thereto.

It is said that there is no decision by the Supreme Court of this State upon this question.

This Court, however, in the case of Graver-Bartlett-Nash Company vs. Kranz 139 Ill. App. 522, is committed to the doctrine that the seller, under such a contract, would not be estopped to assert his title to the property in question by mere failure to repossess, especially as against a judgment creditor.

In the instant case we are dealing with a contention between a seller under a conditional sales contract retaining title and a judgment-creditor of the purchaser under such conditional sales contract. The judgment creditor in this case, in claiming title to the property can assert no better claim than his judgment debtor had. (Sherer-Gillett Co. v. Long, 318 Ill. 434).

Section 23 of Chapter 121½ Smith-Hurd 1931 Illinois Statute provides as follows: --

> "Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

In order to give rise to an estoppel it is necessary that parties estopped shall have made, by act or word, a representation and that a person setting up the estoppel shall have acted on the faith of this representation in such a way that he can not without damage withdraw from the transaction. (1 Williston on Sales 2nd Ed. Sec. 312).

It does not appear from the record before us that plaintiff herein has made any representation by act or word upon which defendant has relied to his damage.

McLaughlin and Michalopoulos never had title to this organ and the defendant herein, being a judgment-creditor, could not assert any greater title against plaintiff than the judgment-debtors could have. The defendant in this case contends that the conduct of plaintiff in allowing McLaughlin and Michalopoulos to retain possession of the organ long after they had defaulted in their payments, under the contract, without exercising any of its rights, clothed the judgment-debtors with indicia of ownership, and amounted to an estoppel within the meaning of Section 23 of the Uniform Sales Act hereinabove quoted, and as a result thereof, plaintiff would be precluded from denying defendant's paramount right. This is effectively answered in Silverthorn v. Chapman 259 Ill. App. 269 at page 292, where the Court says:--

> "Under the plain provisions of Section 23 the theory of estoppel may be invoked only by a purchaser from a conditional vendee and can not be urged in favor of a judgment creditor."

The decisions which we have quoted in this opinion, it seems to us are decisive of the question here presented in favor of the contention of plaintiff upon this point.

We do not think there is any analogy between conditional sales contract and chattel mortgages, so that the same rules applicable to chattel mortgages should apply to conditional sales contract. There is no lien attached to property sold under a conditional sales contract retaining title in the vendor, all the vendee has acquired is a right of possession and that only so long as he complies with the term of the contract, and it would not be proper to treat such property as the property of one who has title; whereas, in the case of a chattel mortgage, the property is that of the mortgagor and the mortgagee only acquires a lien and never gets a title until he has followed the terms of mortgage and the law in such cases made and provided. Such property so belonging to mortgagor, the title being in him, is subject to levy by his creditors and when a levy has been made, it is then incumbent upon the mortgagee, if any there be, to show that he has kept his lien valid.

In this case the record is barren of anything that plaintiff has done to mislead anyone or give rise to the belief that it was not the owner in good faith of this property.

We are therefore of the opinion that this case should be reversed, for the reason that the purported evidence showing the taking and recording of the alleged chattel mortgage, etc. was improperly received by the lower court and it therefore follows that without the evidence of the chattel mortgage, etc. the plaintiff made a prima face case of its right to the property when they showed their title under the conditional sales contract and have done nothing so that by way of an estoppel they are precluded from asserting title to the organ in question as against the defendant in this case.

The case should be reversed and remanded to the County Court with directions to enter an order in conformity with the opinion filed in this case, namely, that the property be declared to be that of the plaintiff.

Reversed and remanded with directions.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of February, in the year of our Lord one thousand nine hundred and thirty-two, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. FRED G. WOLFE, Justice.

Hon. JAMES S. BALDWIN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8465 Agenda 54

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Maxcy-Barton Organ Company, Appellant, vs. Glen Building Corporation, Appellee	Appeal from the County Court of Du Page County.

Baldwin, J.

This case is an appeal from a statutory trial of the right of property.

The pleadings consisted of a notice by Maxcy-Barton Organ Company to the sheriff of Du Page County, claiming the ownership of a theatre organ with attachments, on which the sheriff of Du Page County had levied an execution on a judgment obtained by Glen Building Corporation against McLaughlin and Michalopoulos, the owners of the theatre in which the organ was located, and the customary notices by the sheriff to the Judge of the County Court and by the clerk of the County Court to the judgment creditor.

The claimant corporation, appellant (hereinafter called the plaintiff) is a Wisconsin corporation, formerly known as Bartola Musical Instrument Company, but which, after the conditional sale of the organ herein mentioned, and before the commencement of the suit, changed its name to Maxcy-Barton Organ Company. Plaintiff, on or about June 11, 1926, sold to E. D. McLaughlin and John Michalopoulos a theatre organ for the total price of $12,000, payable $1,200 in cash, $1,200 upon installation, and the remainder in a series of notes of $700 each for twelve months, $250 each for twelve months, $300 each month for five months and $2,700 in the thirtieth month. The sale was evidenced by a conditional sales contract, reserving

Sup. Ct. 1962 Appeals [illegible]

IN THE

SUPREME COURT OF ILLINOIS

SPRING TERM, A.D. 1962

Harry-Charles Organ Company, Appellee,	
vs.	Appeal from the County Court of De Page County.
Glen Building Corporation, Appellee.	

Opinion, J.

This case is an appeal from a mandatory trial of the right of ownership.

The pleadings consisted of a notice by Harry-Charles Organ Company to the sheriff of De Page County, claiming the ownership of a theatre organ with appurtenances, in which the sheriff of De Page County had levied an execution on a judgment obtained by Glen Building Corporation against Independent Industrialists, the owners of the theatre in which the organ was located, and the mandatory notice by the sheriff to the judge of the County Court and by the clerk of the County Court to the judgment creditor.

The claimant counterclaim, appellant (hereinafter called the plaintiff) is a Illinois corporation, formerly known as Metro's Musical Instrument Company, Inc. which, after the constitutional sale of the organ lessee mechanic, and the the the commencement of the suit, changed its name to Harry-Charles Organ Company. PLAINTIFF, on or about June 21, 1957, sold to G. G. Enterprise and Jones Miscellaneous a theatre organ for the total price of $19,000, consisting $1,000 in cash, $1,000 upon installation, and the remainder in a series of notes of $200 each for twelve months, $300 each for twelve months, $500 each month for three months and $1,700 in the ultimate month. The sale was evidenced by 2 conditional sales contract, providing

title to the organ in the seller until the purchase price should be fully paid. McLaughlin and Michalopoulos were residents of Cook County and not of Du Page County. McLaughlin and Michalopoulos paid under this contract a total of $5,500 in installments, substantially as provided in the conditional sales contract, the last payment of $250 having been made December 6, 1928.

In May, 1931, Glen Building Corporation, having procured a judgment against McLaughlin and Michalopoulos, levied it on sundry property in the theatre occupied by the judgment debtors, including the organ and accessories herein involved. Plaintiff filed its claim of right of property in the organ and accessories, relying on its title under the conditional sales contract.

The trial court held that the right of property was in McLaughlin and Michalopoulos, and that the property was subject to the levy, and ordered the sheriff to proceed with the sale of the property under the execution.

The plaintiff contends, that,

1. The trial court erred in holding the title to the property to be in McLaughlin and Michalopoulos, since the undisputed evidence showed title in the plaintiff, and delay in enforcing its rights could neither take away plaintiff's title nor estop plaintiff from asserting its title as against an execution creditor.

2. The trial court erred in permitting improper cross examination of plaintiff's witnesses and in admitting incompetent and improper evidence offered by the defendant; and there is no competent evidence in the record of the, existence, contents, execution or acceptance of any chattel mortgage given by McLaughlin and Mchalopoulos to the plaintiff.

3. If there was evidence of the existence and contents of the alleged chattel mortgage the facts shown did not constitute a waiver or abrogation of the reservation of title in the conditional sale contract, or create a transfer of the title to the judgment debtors.

title to the owner in the seller until the purchase price should be fully paid. Molenpolin and Hiebelpoulos were residents of Cook County and not of the Fox County. Molenpolin had installments paid under this contract a total of $2,500 in installments, substantially as provided in the conditional sales contract, the last payment of $500 having been made December 6, 1972.

In May, 1974, Ellen Delphine Tarpenskian, having purchased a judgment against Molenpolin and Hiebelpoulos, levied it on sundry property in the theatre occupied by the judgment debtors, including the organ and accessories involved. Plaintiff filed its claim of right of property in the organ and accessories, relying on its title under the conditional sales contract.

The trial court held that the right of property was in Molenpolin and Hiebelpoulos, and that the property was subject to the levy, and ordered the plaintiff to proceed with the sale of the property under the execution.

The plaintiff contends, that,

1. The trial court erred in holding the title to the property to be in Molenpolin and Hiebelpoulos, since the undisputed evidence showed title in the plaintiff, and that in enforcing its rights could neither take away plaintiff's title nor deny plaintiff from asserting its title as against its creditors.

2. The trial court erred in permitting improper cross examination of plaintiff's witnesses and in sustaining improper and improper evidence offered by the defendants; and finally in considering evidence in the record of the, evidence, contents, testimony or concealment of any material matters given by Molenpolin and Hiebelpoulos to the plaintiff.

3. If there are evidences of the relationship and conduct of the alleged debtor, notwithstanding the fact, there did not exist a valid in derogation of the conservation of title in the conditional sale contract, to create a transfer of the title to the interest debtors.

The defendant claimed that by the delay in enforcing the provisions of the conditional sale agreement, after default by McLaughlin and Michalopoulos, the plaintiff had lost its rights thereunder as against an execution creditor, and that subsequent to the date of execution and delivery of the conditional sales contract McLaughlin and Michalopoulos gave the plaintiff a chattel mortgage on this organ and sundry extensions, which chattel mortgage was void by reason of sundry defects, and that the plaintiff was prevented by reason of its alleged acceptance of the chattel mortgage from relying on its title under the conditional sales contract, and that its rights under the alleged chattel mortgage were inferior to those of the levying creditor by reason of the defects of such chattel mortgage.

It is further contended by defendant that plaintiff failing to submit any propositions of law to the trial court can not now claim that the trial court erred in applying legal principles to the evidence, and that there is no evidence in the record to identify the property levied upon.

There is no merit in the contention that the plaintiff did not prove or identify the organ as being its property.

An examination of the record discloses that it was identified as being the only organ in the theatre and was the one sold by plaintiff to the execution-debtor.

Plaintiff sold this organ to the execution-debtors in June, 1926, under what is called a conditional sales contract, and there is no question but that the purchase price has not been paid and that the purchasers have been in default since December 6, 1928. The conditional bill of sale had this

The defendant claimed that by the failure to exercise the provisions of the conditional sale agreement, after default by McLaughlin and Blackjacquelne, the plaintiff had lost its rights thereunder as against an execution creditor, and that subsequent to the date of execution and delivery of the conditional sales contract McLaughlin and Blackjacquelne gave the plaintiff a chattel mortgage on this crops and nursery stock, which chattel mortgage was void by reason of nursery defects, and that the plaintiff was prevented by reason of its alleged acceptance of the chattel mortgage from relying on its title under the conditional sales contract, and that its rights under the alleged chattel mortgage were inferior to those of the levying creditor by reason of the defects of such chattel mortgage.

It is further contended by defendant that plaintiff failing to submit any propositions of law to the trial court can not now claim that the trial court erred in applying legal principles to the evidence, and that there is no evidence in the record to identify the nursery trees sues.

There is no merit in the contention that the plaintiff did not prove or identify the crops as being its property.

An examination of the record discloses that it was identified as being the only crops the tenants got was the one sold by plaintiff to the execution-debtor.

Plaintiff sold this crops to the execution-debtors in June, 1932, which was before a mortgagee with mortgage, and there is no question but that the purchase price has not been paid and that the purchasers have been in default since December 1, 1932. The conditional sale of [illegible]

provision in it:-

> "Said second party further agrees that it will execute and deliver such other and further papers as may be proper or necessary to give full legal force and protection hereto in said State where such instrument is to be installed."

As to the question raised by defendant that no propositions of law were furnished the trial court, we think a sufficient answer is found to this contention in P.C.C. & St. L. R. Co. vs. Chicago City Railway Company, 300 Ill. 162, where it was said:

> "The Appellate Court cannot decline to consider the merits of a suit at law tried without a jury merely because no propositions of law were submitted to the trial court, as the decision of the trial court as to the sufficiency of the evidence is not final and binding on the Appellate Court in such case even though no question of law was raised in any manner."

On the trial of this cause the court permitted certain cross examination of plaintiff's witness, Barton, which is claimed was error. He testified on direct examination for the plaintiff with reference to the change of name of plaintiff from that of Bartola Musical Instrument Company to Maxey-Barton Organ Company, and in relation to plaintiff's exhibit 2 for indentification, which was the conditional sales agreement, identifying the signatures thereto; that the contract was delivered at or about its date; that the organ referred to in the contract is the one now in the theatre; that he superintended the installation of it and that the amounts provided in the contract have not all been paid; that only $5,500.00 had been paid and that no one but McLaughlin and Nicholopoulos had paid anything thereon; he detailed the dates and amounts of the payments.

On cross examination defendants sought to examine him with reference to an alleged chattel mortgage and notes, which, it is claimed, were subsequently executed by the parties, who purchased the organ, and delivered to the plaintiff, which was objected to by the plaintiff, but the court permitted him to answer.

provision in it:-

> "Said second party further agrees that it will execute and deliver such other and further instruments as may be proper or necessary to give full legal force and operation herein in said form where such instrument is to be inscribed."

In is the question raised by defendant that no [illegible]

In was dismissed the trial court, we think a motion under

is found in this connection in [illegible] v. [illegible] v. [illegible]

Supreme City Railway Company, 200 Ill. 120, where it was said:

> "The objection that a second deposit is [illegible] the ruling of a suit at law which without a jury merely decides on propositions of law upon which, in the trial court, on the decision of the jury, court is to the sufficiency of the evidence in the final and binding on the Appellate Court in such case even though on question of law raised in the pleadings."

On the trial of this cause the court permitted certain cross examination of plaintiff's witness, Dorsey, which is claimed was error. He testified on direct examination for the plaintiff with reference to the change of name of plaintiff from that of Dorsia Motion Picture Company to Dorsia-Lorraine Company, and in relation to plaintiff's exhibit 1 the documentation, which was the constituent and its agreement, identifying the alleged contract; that the witness was interested as to about the date when the other referred to in the original is the one was in the country; that he superintended the installation of it and that the amounts contained in the original bill had not been paid; that only $2,500.00 had been paid and that to one but defendants and stockholders had paid anything towards the defraying the determined amounts of the payments.

On cross examination defendants sought to impeach his testimony by an alleged contract executed between, which, it is claimed, was subsequently executed to the meeting, and superseded the order, and delivered to the plaintiff, which was signed by the plaintiff, and the court permitted the examination.

This was clearly error on the part of the lower court, as nothing had been testified to by this witness in his examination in chief which would have been made properly the basis of such cross examination by the defendant, and all of that evidence should not have been received and should be stricken. This seems so clear to us that it seems unnecessary to cite authority therefor.

The same witness, Barton, was called as a witness on behalf of the defendant and he was interrogated by defendant's counsel concerning an alleged chattel mortgage and notes secured thereby, claimed to have been executed by McLaughlin and Michalopoulos on this organ and delivered to plaintiffs, and as to the contents of these instruments and as to where these instruments were, and he stated that thirty notes had been given aggregating $10,800.00, and the notes were secured by a chattel mortgage on the organ, all of which were conclusions of his and were improper. He further testified in chief that the notes, mortgages, etc., were sent to one of the attorneys for plaintiff a few days before this trial and that following the execution of the chattel mortgage it was filed for record in DuPage County and subsequently an affidavit extending the time was filed and later another agreement was filed and recorded, but, upon cross examination he said that he was not at Oshkosh when the documents were mailed, if at all, and that he had no personal knowledge of whether they were mailed or not and the court thereupon struck from the record his testimony upon those points; then the witness was recalled by the defendant and in the midst of his direct examination, on being recalled, the following occurred: (Abs. 16-17) "Mr. Hadley: That is all. Now, I call on the plaintiff in this case, its attorneys and its representatives, to produce on the trial of this cause the notes so given for this organ with the chattel mortgage. On their failure so to do we will intro-

This was clearly error on the part of the jury court, as nothing had been testified to by this witness in his examination in chief which would have been some necessary the basis of such cross examination by the defendant, and all of that evidence should not have been received and should be stricken. This seems so clear to us that it seems unnecessary to cite authority thereto.

The same witness, Martin, was called as a witness on behalf of the defendant and he was interrogated by defendant's counsel concerning an alleged alcohol breathpipe and urine analysis, claimed to have been executed by Lafayette and Hildebrandtsen on this night and delivered to Jiménez, and to the contents of those instruments and as to whose signature thereunto were, and he stated that thirty notes had been given amounting $10,000.00, and the notes were secured by a chattel mortgage on the cargo, all of which were complaints of his and were hearsay. On further questioned to what was the contents, mortgages, etc., this was not in one of the instruments for identity. The Court before this ruled and that filing the instruments of the chattel mortgage in the field the record is before Jiménez and subsequently on cross-examination the plaintiff and Lafayette entering agreement was filed and executed, and, was also admissible be said that he was not at Cardenas when the documents were called, if at all, and that he had no personal knowledge of whether they were called or not and the court thereupon stated that the record his testimony does show which the witness was examined by the defendant and in the midst of his answer immediately, on being recalled, the following occurred: (Ibe. 12-13)

Q. Mr. Martin that is all. Now, I call on the witness in this case, the attorney and his representative, to examine on the behalf of this witness the notes on file for this cargo and the chattel mortgage. In their failure or he is not in a position

duce secondary evidence to the contrary.

Mr. Robertson: There has been no notice produced, no document served on us, your Honor.

Mr. Hadley: I am now giving you notice, making it oral. Have you the notes and the chattel mortgage?

Mr. Robertson: Here?

Mr. Hadley: Yes.

Mr. Robertson: No.

Mr. Hadley: Will you produce them?

Mr. Robertson: I haven't them here.

Mr. Hadley: That is not the question I asked.

Mr. Robertson: Well, I think probably the court will take judicial notice, you have ten days in which to serve a legal notice. If you will put me on the stand I will testify.

Mr. Hadley: You are representing the plaintiff, failure on your part to produce them is a refusal on behalf of the plaintiff.

Mr. Robertson: I have no documents such as you describe in the court room or any place in the county.

Mr. Hadley: That is not the question I asked.

Mr. Robertson: You asked me to produce something that is not here.

Mr. Hadley: I asked you if you would produce them.

Mr. Howe: When?

Mr. Hadley: I didn't put any limitation on it.

Mr. Howe: Do you want to?

Mr. Hadley: It will all depend upon his answer.

The Court: Well, failure to produce them, why, of course, secondary evidence will be admitted."

The record here discloses that no notice in apt time was given plaintiff to produce the alleged chattel mortgage and notes. See Conover vs. B. & O. S. W. R. Co. 212 Ill. App. 29; Young vs. People, 221 Ill. 51, which are cited herein for the purpose of showing that a reasonable notice should have been given plaintiff to produce the documents in question before it

Does mandatory evidence to the contrary.

Mr. Patterson: There has been no motion created, or, however
moved on the, you Honor.

Mr. Dudley: I do not advise the motion, motion is void. Does
you the order and the motion workpapers

Mr. Patterson: Right

Mr. Dudley: Yes.

Mr. Patterson: Do.

Mr. Dudley: Will you produce that

Mr. Patterson: I haven't been here.

Mr. Dudley: This is not the motion I moved.

Mr. Patterson: Well, I didn't produce the order -will here.
Dudley-I notice, you have the date in which to move a land motion.
If you will put me on the stand I will testify.

Mr. Dudley: You are representing the plaintiff, Pillsbury co.
your card is produce also is a matter on behalf of the plaintiff.

Mr. Patterson: I have no documents such as you demanded in
the court room or any place in the county.

Mr. Dudley: That is not the question I asked.

Mr. Patterson: You might as be perfect question that is not here.

Mr. Dudley: I asked you if you would produce them.

Mr. Dover: Then

Mr. Dudley: I didn't put any limitation on it.

Mr. Dover: Do you read us

Mr. Dudley: It will all turned upon it's merits.

The Court: Well, failure to produce this, etc, at hearing.
secondary evidence will be admitted.

The record then discloses that in spite of the
the above plaintiff by produce the diagram showing the
motion. The Honorable Mr. J. S. G. K. R. Mr. Mr. Dr. Mr. Mr.
Dover Mr. Dudley, Mr. Mr. Mr. which are other hearing for the
purpose of showing that a reasonable motion should have been
given plaintiff to produce the documents in question before it

would be proper to offer secondary evidence of their contents.

With this alleged foundation, defendant then proceeded to offer in the evidence the original records of Du Page County, showing that on certain dates and in certain books and pages in the Recorder's office of that County there was recorded a certain chattel mortgage given by McLaughlin and Michalopoulos upon this organ; also certain affidavits purporting to be extensions of this mortgage made on the 8th day of October 1929, and January 28, 1931 respectively, and over the objection of plaintiff the court received these records in evidence. Plaintiff objected to the introduction of these records on the ground that there was no sufficient foundation laid for the secondary evidence, no notice to produce the same had been given prior to the time of the trial; no evidence showing that the instrument had been destroyed; that original records of public officials are not admissible, the only proper proceeding being a certified copy of what the record shows, and further that it has been shown by the evidence in the case that the signers of the purported chattel mortgage were not residents of Du Page County and therefore the recording of the mortgage in Du Page County under such circumstances, the property mortgaged being in Du Page County, was not required by law, and the instrument itself and the record thereof in Du Page County were nullities.

We are of the opinion that these records should not have been received in evidence.

In addition to the fact that no proper notice was served on plaintiff to produce the originals, which were not shown to have been destroyed, it appears from the evidence that the persons executing this chattel mortgage, upon the date thereof, were residents of the County of Cook and the property sought to be covered by the alleged chattel mortgage was located in the County of Du Page. The statute requires in such cases, that chattel mortgages in order to be valid, must be filed in the county where

would be return to other secondary evidence of this nature.

With this clumsy transaction, deficient from presumed to offer in the evidence the original records of the County, showing that on certain dates and in certain books and pages in the Recorder's office of that County there was recorded a certain described mortgage given by Malaquias and Consolacion Lim this organo. The certain effective documents to be examined of this mortgage made on the 8th day of October 1940, and dated 19, 1941 respectively, and over the signature of Solicitor the above described trade records in evidence. Counsel objected to the introduction of these records on the ground that there was no sufficient foundation laid for the secondary evidence, so notice to produce the same had been given prior to the time of the trial; no evidence showing that the instruments had been destroyed also certain records of public officials are not admissible, the only proper circumstances under a certified copy of what the record shows, and further also as the best proof by the evidence is the same that the signature of the notarial official notices were not witnesses of the face thereof and therefore the execution of the mortgage in the first instance under circumstances, the original mortgage being in the Court, was not required by law, and the instrument itself and the record thereof in the First Court were published.

Taking of the opinion that these records could not have been received in evidence.

In addition to the fact that on cross-examination defendant in plaintiff to produce the mortgage, which was not given by Lim Guanco, it appears from the evidence that the mortgage executed by the defendant mortgagor, upon the 8th day of October, 1940 mortgage of the Sheriff of Iloilo was the property subject to be secured by the original deed certificate was issued in the County of the First. The absolute ownership in such owner, that defendant mortgagee is under to be valid, must be filed in the County Clerk

the mortgagors reside; unless the mortgagor is a non-resident, then it should be filed in the County where the property is situated. (Smith-Hurd 1931 Illinois Statutes Chapter 95 Section 4.) The recordation of the mortgage and any purported extension or agreements thereunto appertaining in Du Page County was of no avail and not required by law, and therefore should not have been permitted in evidence. (2nd National Bank vs. Thuet, 124 Ill. App. 501). See also Smith-Hurd 1931 Illinois Statutes Chapter 95 Section 6, which provides that only copies of mortgages or affidavits certified to by the proper Recorder may in some instances be received in evidence, therefore, the court below clearly erred in admitting in evidence the records of this purported chattel mortgage and the affidavit of extension and contract above referred to.

As to whether or not the contention of defendant that when plaintiff took the chattel mortgage on this property, if it did do so, it, the plaintiff, acknowledged to the public that the title was in the purchaser and would therefore be estopped to deny that title was not in purchasers, we do not now undertake to decide, as we think the evidence concerning this chattel mortgage was improperly admitted, and in the view we take of the matter, that question is not now properly before us for decision.

A more serious question arises in this case as to the failure of the plaintiff to take possession of the property under the conditional bill of sale, after the purchasers were in default in payments for more than two years, and by such conduct caused the public to believe that the purchasers were the owners of the property and therefore were estopped from asserting title thereto.

It is said that there is no decision by the Supreme Court of this state upon this question.

This court however, in the case of Graver-Bartlett-Nash Company vs. Krenz, 139 Ill. App. 532, is committed to the doctrine that the seller, under such a contract, would not be estopped to

the employment agency unless the employee is a non-citizen, then it should be filed in his county where the employee is located. [Illinois-Jerd Ill. Illinois statutes Chapter 48 section 6.] The recordation of the mortgage and any unrecorded encumbrance or encumbrance agreement in the form thereof shall be of no avail and not required by law, and therefore should not have been considered in evidence. [Ind Finance Co. vs. Thurl, 1.4 Ill. App. 2d]. See also Illinois Ill Illinois statutes Chapter 38 section 2, which states that only forms of mortgages or affidavits satisfied by the proper officer may be some instrument to complete in evidence, therefore, the court have clearly erred in admitting in evidence the records of this unrecorded chattel mortgage and the affidavit of defendant and contract close referred to.

As to charges as and the consideration of indemnity that plaintiff took the chattel mortgage on this property, it is said, is, the plaintiff, acknowledged on the review that the title was in the mortgagor and would therefore be unknown to them that title was not in mortgagor, we do not for undertake to decide, as we think the evidence concerning this chattel mortgage was improperly admitted, and in the view we take of the matter, that question is not so properly before us for decision.

A more serious question raised in this case is as to the failure of the plaintiff to show possession of the property after the contract was made. After the repossession was in defendants in ownership for more than one year, and by such conduct caused the public to believe that the conditions were the owners of the property, and therefore were entitled from creditors little liberty.

It is said that there is no testimony to the contrary that of this state such this question.

The court however, in the case of Carter-Crittenden Company vs. Stone, 192 Ill. App. 472, is consulted to the decision that the public, under such a contract, could not be entered to

assert his title to the property in question by mere failure to repossess, especially as against a judgment creditor.

In the instant case we are dealing with a contention between a seller under a conditional sales contract retaining title and a judgment-creditor of the purchaser under such conditional sales contract. The judgment creditor in this case, in claiming title to the property can assert no better claim than his judgment debtor had. (Sherer-Gillett Co. vs. Long, 318 Ill. 434).

Section 23 of Chapter 121½ Smith-Hurd 1931 Illinois Statute provides as follows:-

> "Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

In order to give rise to an estoppel it is necessary that parties estopped shall have made, by act or word, a representation and that a person setting up the estoppel shall have acted on the faith of this representation in such a way that he can not without damage withdraw from the transaction. (1 Williston on Sales 2nd Ed. Sec. 312).

It does not appear from the record before us that plaintiff herein has made any representation by act or word upon which defendant has relied to his damage.

McLaughlin and Michalopoulos never had title to this organ and the defendant herein, being a judgment-creditor, could not assert any greater title against plaintiff than the judgment-debtors could have. The defendant in this case contends that the conduct of plaintiff in allowing McLaughlin and Michalopoulos to retain possession of the organ long after they had defaulted in their payments, under the contract, without exercising any of its rights, clothed the judgment-debtors with indicia of ownership, and amounted to an estoppel within the meaning of Section 23 of the Uniform Sales Act hereinabove quoted, and as a result

assert his title to the property in question by a re-filing to assignee, non-title or against a bona-fide claimant.

In the instant case we are dealing with a contract between a seller under a conditional sales contract retaining title and a judgment-creditor of the purchaser under such conditional sales contract. The judgment creditor in this case, as claimant, title to the property can always be better than the judgment debtor had. (Sheets-Gilfert Co. vs. Lowe, 232 III. 464).

Section 77 of Chapter 126 authorizes the seller to make assertion to title:

> "Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

In order to give rise to an estoppel it is necessary that seller estopped shall have made, by act or word, a representation and that a person relying on the representation shall have acted on the faith of this representation in such a way that he can not withdraw and change without from the transaction. (2 Williston on Sales and Id. Sec. 319).

It does not appear from the record before us that plaintiff herein has made any representation by act or word upon which defendant has relied to his damage.

Mahoney's and Blackstone never had title to this. Hence and the Conditional Sales, Inc. a [illegible], will not assert any claim title against plaintiff that the purchaser-debtors could. The defendant in this case presents also the question of priority in Sherman Mahoney and Blackstone as regards movements of the action long after they had surrendered in their possession, under the contract, without consideration or the title, claiming the Judgment-debtors title against of assignee, and assumed to be referred title the morning of [illegible] 19 of the United Sales Conditional Sales, and in a [illegible]

thereof, plaintiff should be precluded from denying defendant's paramount right. This is effectively answered in Silverthorn vs. Chapman, 259 Ill. App. 269, where the court says: --

> "Under the plain provisions of Section 23 the theory of estoppel may be invoked only by a purchaser from a conditional vendee and can not be urged in favor of a judgment creditor."

The decision which we have quoted in this opinion, it seems to us are decisive of the question here presented in favor of the contention of plaintiff upon this point.

We do not think there is any analogy between conditional sales contract and chattel mortgages, so that the same rules applicable to chattel mortgages should apply to conditional sales contract. There is no lien attached to property sold under a conditional sales contract retaining title in the vendor, all the vendee has acquired is a right of possession and that only so long as he complies with the term of the contract, and it would not be proper to treat such property as the property of one who has title; whereas, in the case of a chattel mortgage, the property is that of the mortgagor and the mortgagee only acquires a lien and never gets a title until he has followed the terms of mortgage and the law in such cases made and provided. Such property so belonging to mortgagor, the title being in him, is subject to levy by his creditors and when a levy has been made, it is then incumbent upon the mortgagee, if any there be, to show that he has kept his lien valid

In this case the record is barren of anything that plaintiff has done to mislead anyone or give rise to the belief that it was not the owner in good faith of this property.

We are therefore of the opinion that this case should be reversed, for the reason that the purported evidence showing the taking and recording of the alleged chattel mortgage, etc., was improperly received by the lower court and it therefore follows that without the evidence of the chattel mortgage, etc., the plaintiff made a prima facie case of its right to the property

thereof, plaintiff should be precluded from levying defendant's reserved right. This is effectively received by plaintiffs so. Therefore, for this, then, we have the court says:

> "Under the plain provisions of section 70 the theory of estoppel may be invoked only by a mortgagee from a conditional vendee and can not be used in favor of a judgment creditor."

The decision which we have quoted in this matter, it seems to us are decisive of the question here presented in favor of the contention of plaintiff upon this point.

We do not think there is any analogy between conditional sales contract and chattel mortgages, so that the same rules applicable to chattel mortgages should apply to conditional sales contract. There is no lien attached to property held under a conditional sales contract retaining title in the vendor, all the vendee has received is a right of possession and that only so long as he complies with the terms of the contract, and it would not be proper to treat such property as the property of one who has title thereon, in the case of a chattel mortgage, the property by is that of the mortgagor and the mortgagee only acquires a lien and never gets a title until he has foreclosed the terms of mortgage and the law in such cases made and provided. Such property as belonging to mortgagor, the title being in him, is subject to levy by his creditors and when a levy has been made, it is then known that upon the mortgagee, if any there be, to show that he has kept his lien valid

In this case the record is devoid of evidence that plaintiff has done so although argument is give view to the belief that it was not the owner in good faith of its mortgage.

We are therefore of the opinion that this case should be reversed, for the reason that the undisputed evidence shows the taking and possession of the alleged chattel mortgage, the, not necessarily required by the laws which ad ly therefore differs that without the authority of the chattel mortgage, etc., the plaintiff made a valid claim that of its right to the property

when they showed their title under the conditional sale contract and have done nothing so that by way of an estoppel they are precluded from asserting title to the organ in question as against the defendant in this case.

The case should be reversed and remanded to the county court with directions to enter an order in conformity with the opinion filed in this case, namely, that the property be declared to be that of the plaintiff.

Reversed and remanded with directions.

when they moved their [illegible] under the conditions [illegible] and have done nothing on their by way of an attempt they are precluded from asserting title to the crops in question as against the defendant in this case.

The case should be reversed and remanded to the county court with directions to enter an order in conformity with the opinion filed in this case, namely, that the property be declared to be that of the plaintiff.

Reversed and remanded with directions.

STATE OF ILLINOIS,
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(65027—1M—9-31) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8485 Agenda No. 3.

In The

APPELLATE COURT OF ILLINOIS

Second District

May Term, A. D. 1932.

Illinois Refining Company,
a corporation
Complainant-Appellee,

vs.

Illinois Oil Company,
a corporation
Defendant-Appellant.

Appeal from the
Circuit Court of
Rock Island County.

BALDWIN, J.

This is an appeal from the Circuit Court of Rock Island County seeking to reverse a decree of that court in favor of the complainant, Illinois Refining Company, and against the defendant, Illinois Oil Company.

The bill of complaint filed January 29th, 1928 alleged that the complainant, Illinois Refining Company, and the defendant, Illinois Oil Company, were Illinois corporations; that defendants, Frank P. Welch and J. M. Welch, were officers of both companies; that prior to March 20th, 1926 the complainant was controlled by Frank P. Welch; that about 1916 the defendants, J. M. Welch, Frank P. Welch, Illinois Oil Com-

pany, Kawfield Oil Company and Walter A. Russ, formed a conspiracy to so handle the affairs as to control the market price of the stock of such companies and to cause complainant to assume all risk of speculative purchases of oil for the defendant, Illinois Oil Company, and that the affairs of the complainant should be so managed as to benefit the defendants, Illinois Oil Company and Frank P. Welch and J. M. Welch and that the defendants made large profits by the use of moneys of complainant and that complainant was entitled to such profits. Then follow certain allegations as to amounts claimed to have been lost by the complainant by alleged acts of the defendants. Demurrer of Walter A. Russ was confessed and the suit dismissed as to him. J. M. Welch was not served.

The remaining defendants, Frank P. Welch and Illinois Oil Company, filed their answer and specifically denied each allegation in the bill of complaint and asserted that one A. B. Honnold had made extravagant charges and brought about the litigation for his own benefit as detailed in their answer and that said Honnold was now in the management of the complainant under certain contracts therein described and that said Honnold had instigated litigation against defendants making false and malicious charges.

The cause was referred to the master in chancery, who found both the Illinois Refining Company and Illinois Oil Company had several officers in common from 1917 to 1920 and that Frank P. Welch exercised dominant influence over the affairs of both corporations; that as a result of an increase in capital stock during 1917 complainant had on hand $900,000.00; that during 1917, 1918, 1919 and 1920 a large part of the funds of the complainant was loaned to and used by the Illinois Oil Company and that earnings of the respective years of the Illi-

pany, Kawfield Oil Company and Walter A. Hues, formed a conspiracy to so handle the affairs as to control the market price of the stock of such companies and to cause complainant to assume all risk of speculative purchases of oil for the defendant, Illinois Oil Company, and that the affairs of the complainant should be so managed as to benefit the defendants, Illinois Oil Company and Frank P. Welch and J. M. Welch and that the defendants made large profits by the use of moneys of complainant and that complainant was entitled to such profits. Then follows certain allegations as to amounts claimed to have been lost by the complainant by alleged acts of the defendants, Demurrer of Walter A. Hues was confessed and the suit dismissed as to him. J. M. Welch was not served.

The remaining defendants, Frank P. Welch and Illinois Oil Company filed their answer and specifically denied each allegation in the bill of complaint and asserted that one A. B. Donnold had made extravagant charges and brought about the litigation for his own benefit as detailed in their answer and that said Donnold was now in the management of the complainant under certain contracts therein described and that said Donnold had instigated litigation against defendants making false and malicious charges.

The cause was referred to the master in chancery, who from data the Illinois Indiana Company and Illinois Oil Company had received affidavits in answer from 1917 to 1920 and that Frank P. Welch attached business affidavits over the affiants of both corporations; that as a result of an increase in capital stock during 1917 complainant had on hand $600,000.00; that during July, 1918, 1919 and 1920 a large part of the funds of the complainant was loaned to and used by the Illinois Oil Company and that managers of the respective parts of the Illi-

nois Oil Company amounted to the various sums therein set forth and that the percentage of earnings of such company earned by the moneys of the complainant was the percentage that the moneys of complainant so loaned to defendant, Illinois Oil Company, bore to the total moneys used by such company and certain percentages were found and set forth and that there was due the complainant from the defendant, Illinois Oil Company, the sum of $128,380.27 and that Frank P. Welch was secondarily liable for such sum. Objections were filed to such report by the defendants and by the complainant. The objections of the defendants were overruled, but the objection of the complainant that interest should have been allowed at five per cent per annum from July 1st, 1920 was allowed and the sum so found to be due was increased to the sum of $201,057.76.

Upon exceptions being heard by the Court, the Master's report was approved, except as to the finding that Frank P. Welch was secondarily liable, and a decree entered against the Illinois Oil Company (hereinafter referred to as defendant) for the sum of $201,057.76 in favor of the Illinois Refining Company (hereinafter referred to as complainant.).

The evidence disclosed that the Illinois Oil Company had been incorporated in 1914 but had been operated as an unincorporated company for four or five years prior to such date; that after incorporation its board of directors consisted of nine directors, one of whom was Frank P. Welch. It had been successful in the sale of petroleum products. In 1916 it began the refining of oil and the manufacture of other merchandise. In 1916 another company (Kawfield Oil Company) was organized for the purpose of producing crude oil with a capital stock of $150,000.00. This proved insufficient to buy and develop oil leases.

The Illinois Refining Company was a corporation at Gales-

nois Oil Company amounted to the various sums therein set forth and that the percentage of earnings of such company earned by the money of the complainant was the percentage that the money of complainant so loaned to defendant, Illinois Oil Company, bore to the total money used by such company and certain percentages were found and set forth and that there was due the complainant from the defendant, Illinois Oil Company, the sum of $109,480.27 and that Frank P. Welch was secondarily liable for such sum. Objections were filed to such report by the defendants and by the complainant. The objections of the defendants were overruled, but the objection of the complainant that interest should have been allowed at five per cent per annum from July 1st, 1920 was allowed and the sum so found to be due was increased to the sum of $201,027.76.

Upon exceptions being heard by the court, the master's report was approved, except as to the finding that Frank P. Welch was secondarily liable, and a decree entered against the Illinois Oil Company (hereinafter referred to as defendant) for the sum of $201,027.76 in favor of the Illinois Refining Company (hereinafter referred to as complainant.).

The evidence disclosed that the Illinois Oil Company had been incorporated in 1914 but had been operated as an unincorporated company for some time prior to that date. [illegible] after incorporation its board of directors consisted of nine directors, two of whom are [illegible]. [illegible] the sale of petroleum products. In 1918 it began the refining of oil and the manufacture of other merchandise. In 1918 another company (Rawfield Oil Company) was organized for the purpose of producing crude oil with a capital stock of $100,000. [illegible] investigations by [illegible] oil leases.

The Illinois Refining Company was a corporation of [illegible]

burg, Illinois, with a capital stock of $10,000.00. It was managed by a board of directors consisting of five members. About the year 1916 this company was purchased by Frank P. Welch and others acting with him and its capital stock increased to $1,000,000.00. The new stock was sold for $990,000.00, its full par value, without employment of solicitors or expense. Such money was to be used in acquiring and developing oil leases, but it necessarily required some time to accomplish such purpose. Meantime, the moneys of the complainant were loaned to various banks at from three to four per cent. From 1917 to 1920 various sums of money were loaned by the complainant to the defendant. All of such money so loaned to the defendant was fully repaid by said defendant with interest thereon at the rate of five per cent per annum. During 1920 and subsequent thereto, the defendand on many occasions made loans to and advancements on behalf of the complainant but such moneys complainant repaid with five per cent interest.

The loans of both companies when made to each other were evidenced only by charges entered upon their books and when payments were made, credits were entered in such books. Beginning in 1920 the complainant ceased to make loans and became a borrower.

The complainant did not own a refinery but did ultimately operate one at Bristow, Oklahoma under a lease executed in March 1920. The defendant owned and operated a refinery at Cushing, Oklahoma.

The bill of complaint alleged a conspiracy to perpetrate a fraud upon complainant and contained various allegations of damages resulting from alleged acts committed in pursuance of such conspiracy.

In support of theallegations of the bill, testimony of

burg, Illinois, with a capital stock of $10,000.00. It was managed by a board of directors consisting of five members. About the year 1910 this company was purchased by Frank A. Nelson and others acting with him and its capital stock increased to $1,000,000.00. The new stock was sold for $850,000.00, its full par value, without employment of solicitors or expense. Such money was to be used in acquiring and developing oil leases, but it necessarily required some time to accomplish such purpose. Meanwhile, the wages of the complainant were loaned to various banks at from three to four per cent. From 1917 to 1920 various sums of money were loaned by the complainant to the defendant. All of such money so loaned to the defendant was fully repaid by said defendant with interest thereon at the rate of five per cent per annum. During 1920 and subsequent thereto, the defendant on many occasions made loans to and advancements on behalf of the complainant but such sums complainant repaid with five per cent interest.

The loans of both companies when made to each other were evidenced only by changes entered upon their books and when repayments were made, credits were entered in such books. Beginning in 1920 the complainant ceased to make loans and became a borrower.

The complainant did not own a refinery but did own with exactly concrete one at Wichita, Oklahoma under a lease executed in June 1920. The defendant owned and operated a refinery at Cushing, Oklahoma.

The bill of complaint filed a complaint in several [illegible] and contained various allegations [illegible] the plaintiff's rights in the premises of such corporations.

In support of the allegations of the bill, testimony of

one G. H. Smith was offered, who testified he was a public accountant of Tulsa, Oklahoma, and that he saw certain books and records of the complainant at the operating headquarters near Slick, Oklahoma.

That the books and records of the complainant and of the Kawfield Oil Company were to some extent intermingled; That he had the ledger of the complainant containing an account of the Illinois Oil Company for the period ending about November 30th, 1918 and he also identified certain other papers which he testified he found in the files of the complainant company. Also that he had the cash book of the complainant company for the period beginning March 2nd, 1917 and ending September 26th, 1917 and others for the period beginning March 1st, 1919 and ending December 31st, 1922.

From the records so stated to be in his possession the witness Smith testified to various charges on the debit and credit side of different pages of such books showing various charges on the debit side and various credits on the credit side of such books. One account was marked "Illinois Oil Company" and another was marked "Oil Purchase Account." Both of such accounts, being ledger accounts, show entries from other records and balances.

Such witness also testified as to certain carbon copies of letters which he said he found in the files of the complainant and of the Kawfield Oil Company in an office in a frame building about a mile and one-half North and East of Slick, Oklahoma.

Witness Smith identified certain photostatic copies of certain pages from a book which he designated the cash book. Also certain carbon copies of instruments, part of which do not purport to be connected with the defendant in any manner. After

Mr. G. M. Smith was offered, who testified he was a public accountant of Tulsa, Oklahoma, and that he has certain books and records of the complainant at the operating headquarters near Stilwell, Oklahoma.

That the books and records of the complainant and of the Lawfield Oil Company were in some extent intermingled; that he had the ledger of the complainant containing an account of the Illinois Oil Company for the period ending about November 30th, 1918 and he also identified certain other papers which he testified be found in the files of the complainant company. Also that he had the cash book of the complainant company for the period beginning March 2nd, 1917 and ending September 30th, 1917 and others for the period beginning March 1st, 1918 and ending December 31st, 1917.

From the records so stated to be in his possession the witness Smith testified to various charges on the debit and credit side of different pages of such books showing various charges on the debit side and various credits on the credit side of such books. One account was marked "Illinois Oil Company" and another was marked "Oil Purchase Account." Both of such accounts, being ledger accounts, show entries from other records and balances.

Such witness also testified as to certain carbon copies of letters which he said he found in the files of the complainant and of the Lawfield Oil Company in an office in a frame building about a mile and one-half from the town of Stilwell, Oklahoma.

Witness also identified several photographic copies of certain pages from a book which he designated the "Daily Log." Also certain carbon copies of instruments, part of which he said appear to be signed with the defendant in his account.

identifying such copies of pages of the book he testified as to items shown upon the debit and credit sides of such book.

Upon an order of the Circuit Court the witness was permitted to examine the records of the defendant. He testified that he examined such books for the period from August 1st, 1917 to July 1st, 1920 and that he had a statement of the Illinois Oil Company account on the complainant's books and checked it with the Illinois Oil Company books and that he prepared certain computations as to division of earnings between the two companies, such computation, however, was based upon his own conclusions and calculation and not upon the records of either of the companies.

He testified that in his computations and conclusions as to a division of profits between such companies, he followed the direction of one A. H. Honnold, the solicitor for the complainant herein.

He also testified that upon the examination of the Illinois Oil Company's books he found such company did owe money to other people and that the books of the Illinois Oil Company showed that it had paid all of its obligations during the period in controversy and that it had paid interest on all moneys borrowed at the rate of five per cent per annum, including the complainant company; that he made no examination of the records of the defendant beyond July 1st, 1920 because he said on that date all moneys which the Illinois Oil Company owed to the Illinois Refining Company were paid in full.

The complainant also offered in support of its bill the testimony of Mark M. Harder, who said he had been a stockholder of the complainant company since 1917 and that at the annual meeting of the company on March 17th, 1927 he was elected to such office. He purported to identify the minute book of such company for the period beginning November 23rd, 1916 and ending

identifying documents of proof of his work as described as to items shown upon the debit and credit sides of such book.

Upon an order of the Circuit Court the witness permitted to examine the records of the defendant. He testified that he examined such books for the period from August 1st, 1917 to July 1st, 1920 and that he had a statement of the Illinois Oil Company account on the consolidated books and compared it with the Illinois Oil Company books and that he generally verified the accounts as to division of earnings between the two companies, such computation, however, was based upon his own computations and calculation and not upon the records of either of the companies.

He testified that in the accounts and computations as to a division of profits between such companies, he relied the direction of one A. G. Dawson, the president for the defendant herein.

In also testified that also the stockholders of the Illinois Oil Company books be found such company did use as by be other people and that the books of the Illinois Oil Company showed that it had paid all of its obligations during the period in controversy and that it had paid interest on all money borrowed at the rate of five per cent per annum, including the creditors company. That he made an examination of the records of the defendant beginning July 1st, 1920 because he said on the Illinois Oil Company which the Illinois Oil Company --and to the Illinois Refining Company were paid in full.

The complainant then offered in support of its bill the testimony of Wm. P. Martin, who said he had been a stockholder of the complainant company since 1917 and that at the annual meeting of the company on March 12th, 1918 he was elected to such office. He proceeded to identify the stock book of such company for the period beginning December 31st, 1917 and ending

March 20th, 1926 and to give an abstract of its contents but inasmuch as we do not regard this particular matter as especially material to this opinion we do not quote them at length but shall refer to such book later.

Frank P. Welch testified on behalf of the defendant that he was president of the Illinois Oil Company and had been since its organization; that such company had been incorporated in 1914 but had operated for four or five years prior to that as an unincorporated company; that the company had been very successful and that generally its business had been that of marketing petroleum products; that in 1916 the company began refining oil and manufacturing barrels, paints, etc., and was successful in that line of business.

That in 1916 the Kawfield Oil Company was organized for the purpose of producing crude oil; that its capital stock was $150,000.00 and such amount was insufficient to buy and develop leases; that the Illinois Refining Company, a $10,000.00 corporation of Galesburg, Illinois, was purchased; that its capital stock was increased to $1,000,000.00 and all of the increased stock, being $990,000.00, was sold in two or three months without the employment of agents and without the payment of commissions and when such sales were completed the Illinois Refining Company had on hand $990,000.00 in cash to be used in acquiring and developing oil leases.

Pending the investment of this money the Illinois Refining Company had considerable sums of idle money on hand and such moneys were loaned to different banks about the country and at a rate of from three to four per cent interest and that later a part of the money was loaned to the Illinois Oil Company at a rate of five per cent.

That after the Illinois Refining Company had been pur-

Under this, 1972 was to give an abstract of its business for interest as you do not report this subsidiary rather as an profit original in this bulletin to do not write that at least not still refer to such such later.

Item 1. value depicted as basis of the determination to the company or the Illinois Oil Company and not case since its organization. That such income had been instructed in 1972 but had overlooked for fear of the money order to that is an income control account; that the company had been overpaid and that possibly its business had the idea of marketing petroleum products; that in 1972 the account began selling oil and manufacturing in cola, soda, etc., and the bookkeeper in that line of business.

That in 1972 the Arkansas Oil Company was organized for the purpose of producing crude oil; that its capital stock was $150,000.00 and such amount was insufficient to pay our drilling leases; that the Illinois Refining Company, a $50,000.00 corporation of Salesburg, Illinois, was purchased; that the capital stock was increased to $1,750,000.00 and all of the increased stock, being $900,000.00, was sold to the at these worlds with not the employees of Sandy and without the interest of investigation and that such sales were non-taxed the Illinois Refining Company has on hand $900,000.00 in cash to its used in operating and developing oil leases.

Further the investigation of this money the Illinois Refining Company had investigated some of this money on hand but such money were loaned to different banks about the country and at a rate of from three to four per cent interest and that taken a risk of the money was loaned to the Illinois Oil Company at a rate of five per cent.

That after the Illinois Refining Company had been out-

chased the Illinois Oil Company advanced moneys for its purposes and that for many years there were constant debits and credits between the two companies, that is, the idle money of the Illinois Refining Company was sometimes loaned to the Illinois Oil Company and the Illinois Oil Company sometimes loaned money to or paid the obligations of the Illinois Refining Company and that the Illinois Oil Company never at any time had on hand any of the moneys of the complainant when it had use for such moneys itself and that as the complainant company needed the moneys it had loaned to the Illinois Oil Company the same were repaid.

When moneys were loaned to the Illinois Oil Company by the Illinois Refining Company notes were not usually given but the transaction was carried on the books as an open account and that the debits and credits constantly changed from day to day and that the same thing was true when the Illinois Oil Company loaned money to the Illinois Refining Company; that the entire transactions were carried on the books as charges and credits; that sometimes when loans were made to banks a certificate of deposit was issued.

That beginning in June 1920 the complainant became a constant borrower and borrowed moneys from the Illinois Oil Company and that on some occasions the witness himself had advanced moneys to the complainant company.

That the Illinois Refining Company purchased no crude oil of any kind until March of 1920 when it leased a refinery at Bristow, Oklahoma.

Witness also testified to certain advances and threats which had been made to him concerning the litigation herein.

David Warwick testified on behalf of the defendant that he was secretary and director of the Illinois Refining Company

chased the Illinois Oil Company advanced money for its purposes and that for many years there were constant debits and credits between the two companies, th t is, the idle money of the Illinois Refining Company was sometimes loaned to the Illinois Oil Company and the Illinois Oil Company sometimes loaned money to or paid the obligations of the Illinois Refining Company and that the Illinois Oil Company never at any time had on hand any of the moneys of the complainant when it had use for such moneys itself and that as the complainant company needed the moneys it had loaned to the Illinois Oil Company the same were repaid.

When moneys were loaned to the Illinois Oil Company by the Illinois Refining Company notes were not usually given but the transaction was carried on the books as an open account and that the debits and credits constantly changed from day to day and that the same thing was true when the Illinois Oil Company loaned money to the Illinois Refining Company; that the entire transactions were carried on the books as charges and credits; that sometimes when loans were made to banks a certificate of deposit was issued.

That beginning in June 1920 the complainant became a constant borrower and borrowed moneys from the Illinois Oil Company and that on some occasions the witness himself had advanced moneys to the complainant company.

That the Illinois Refining Company undertook to erect oil of any kind until March of 1920 when it leased a refinery at Hinton, Illinois.

Witness also testified to certain arrangements and transactions which had been made in his connection with Illinois Oil.

David Vernier testified on behalf of the defendant that he was secretary and director of the Illinois Refining Company

from the time of its organization until 1919 and that the books of account of such company were kept at Rock Island and that he knew the funds of the Illinois Refining Company were being loaned to the Illinois Oil Company and that he entered the transactions on the records of the Illinois Refining Company and that the subject was discussed at directors' meetings and that when the loans were made only such moneys as the Illinois Refining Company had no present use for were loaned; that he had no knowledge of any such account as was referred to in Complainant's Exhibit 3 as "oil purchase account"; that he never authorized any bookkeeper to so designate such an account.

Witness Edwards testified that he was secretary of the Illinois Oil Company and that he did not know why the Illinois Refining Company had carried an account on its books designated as "oil purchase account;" that upon the books of the Illinois Oil Company the accounts of moneys borrowed from the complainant company were carried in a separate account and he identified such account, showing the moneys loaned by the complainant company to the Illinois Oil Company and the moneys loaned by the Illinois Oil Company to the Illinois Refining Company. He also identified other amounts from the records of the defendants, one of which showed all the purchases made by the Illinois Oil Company from the complainant company while it was operating its refinery at Bristow, Oklahoma. He also testified that the defendant had an account which contained charges against the Illinois Refining Company for purchases made by the Illinois Oil Company against the complainant company and charged to its account. Thus the records of the defendant showed three accounts, one showing loans to and from complainant; one showing purchases from complainant and one showing advancements on behalf of the complainant.

from the time of its organization until 1918 and that the books of account of such company were kept at Fort Laird and that at the time the funds of the Illinois Refining Company were being loaned to the Illinois Oil Company and also he entered the transactions on the records of the Illinois Refining Company and that the subject was discussed at directors' meetings and that the funds were made only such moneys as the Illinois Refining Company had no present use for were loaned; that he had no knowledge of any such account as was referred to in Complainant's Exhibit 3 as "Oil purchase account"; that he never authorized any bookkeeper to so designate such an account.

Hughes Shipps testified that he is the secretary of the Illinois Oil Company and that he did not know why the Illinois Refining Company had carried an account on its books designated as "oil purchase account;" that upon the books of the Illinois Oil Company the amounts of money borrowed from the complainant company were carried in a separate account and be identified such account, showing the moneys loaned by the complainant company to the Illinois Oil Company and the moneys loaned by the Illinois Oil Company to the Illinois Refining Company. He also identified other amounts from the records of the defendants, one of which showed all the purchases made by the Illinois Oil Company from the complainant company while it was operating its refinery at Ardmore, Oklahoma. He also testified that the defendant had an account which contained charges against the Illinois Refining Company for purchases made by the Illinois Oil Company against the same Illinois Refinery and charged to its account. Also the records of the defendant showed these amounts, and showing these to not from complainant; the minutes showed the complainant and the following advancements on behalf of the complainant.

The account designated "oil purchase account" upon the books of the Illinois Refining Company contained identical items with the account of the Illinois Oil Company showing loans and repayments thereof between the two companies.

He also testified that the complainant company borrowed money from the defendant company under the date of August 4th, 1920 of $50,000.00; under date of August 26th, 1920 of $50,619.00; under date of December 4th, 1920 $50,000.00; that at the time of these loans the defendant owed the complainant nothing.

The complainant also offered the testimony of approximately fifteen persons, allof whom testified that they were stockholders but none of them officers of the complainant so far as we can ascertain from the record. Each of such persons was asked substantially the same question: "When did you first learn that the capital of the Illinois Refining Company was used to finance the Illinois Oil Company in the years 1917, 1918, 1919 and 1920?" The defendant objected to the competency of this question on each occasion.

This question does not call for any fact but asks merely when knowledge was received of an assumed fact. Whether the capital of the complainant was used to finance the defendant was and properly should be a matter of proof and not of assumption. It is to be observed that not one of these witnesses was asked if he had any knowledge of loans being made by the complainant to any person whatever, nor was any of such witnesses asked if he had any knowledge of the complainant borrowing from the defendant.

Opposed to this, witness Bowen said he had been a stock-

The account designated "oil purchase account" upon the books of the Illinois Refining Company contained various items with the account of the Illinois Oil Company showing loans and repayments thereof between the two companies.

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Proceed to this, witness Dawes said he had been a stock-

holder and director of the complainant and that he knew the complainant was loaning idle moneys to defendant. Witness Warwick testified that he was a stockholder, director and secretary of complainant from its organization to 1919 and that he had knowledge of such loans; that although he had been secretary of the complainant he never knew of nor authorized any such account as "oil purchase account." Witness Armstrong testified that he was a member of the board of directors of the complainant company and that he knew that idle moneys of complainant were being loaned and that some loans were made to defendant and that the suggestion of such loans was not made by the defendants herein.

The evidence, if it proves anything, merely establishes the fact that the complainant loaned a portion of its moneys before the same was needed in its business, to various banks and that it invested in bonds of the United States Government and later made loans of a portion of its idle funds to defendant. And, although each of the borrowers, including the defendant, likely used the moneys so borrowed (but such fact is not proven by the evidence) in the furtherance of their respective businesses, it could not be seriously contended that the complainants were financing the various businesses of such borrowers.

The loaning of money is simply the extending of credit to the borrower to the extent of the sum loaned, for a consideration and creates only the relationship of debtor and creditor. It is a "letting for hire" of the moneys of the lender to a borrower who is obligated to return a like sum and in addition thereto the stipulated rate of interest.

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money as was loaned to the defendant yielded the complainant a higher rate of interest than it received from any other source. This of itself would indicate the exercise of good business judgment on the part of the directors of the complainant.

It does not appear that the witness, Smith, had any connection whatever with the complainant company; the Illinois Oil Company or with the company which was been referred to as the Kawfield Oil Company or that he had any knowledge or information concerning the books or records of the said complainant company or either of the other companies, except such as he received from the books he said he found in the building located near Slick, Oklahoma.

No testimony is offered (a) that such books were in fact books of the complainant; (b) that such books were books of original entry; (c) that the entries in same were true or correct; (d) that they were made in the regular course of the business of the said complainant company by any one in its employ or at its direction whose duty it was to make such entries; (e) at the time the transactions occurred and (f) that the transactions therein purport to be recorded as actually occurred.

No testimony is offered on the part of the complainant concerning the book said to be the minute book of the complainant, except that of witness Harder, whose testimony wholly failed to establish the authenticity of such book.

It is provided by statute of this State (Chapter 51, Sec. 3 Cahill's Illinois Revised Statute) that "where in any civil action, suit or proceeding, the claim of defense is founded on a book account, any party or interested person may testify to his account book and the items therein contained;

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that the same is a book of original entries, and that the entries therein were made by himself, and are just and true; or were made *** by a disinterested person, a non-resident of the State at the time of the trial, and were made by such *** in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account book and entries shall be admitted as evidence in the cause."

This statute in no way changed the common law rule of evidence relating to book accounts, except to make the litigant himself a competent witness to testify concerning his books.

Such statute was the subject of construction in House vs Beak 141 Ill. 290 and the court said (page 296): "This statute permits the litigant himself to testify to his own books. The party himself was not allowed to testify at common law. The common law requires, that the entries in the books should be proved by the clerk or servant who made them, if such clerk or servant be alive and can be produced. It was necessary, in order to make a book admissible, that the entries therein contained should be made in the ordinary course of business by a person whose duty it was to make them, and that they should have been made contemporaneously with the delivery of the goods so as to form a part of the res gestae." (C. & N. W. R. W. Co. vs Ingersoll 65 Ill. 399).

In Johnson Coal Company vs Forcade 136 Ill. App. 21 a witness testified to certain records and stated that he knew that the records were correct, although he did not make them or have anything to do with the making and the court there held that such testimony was insufficient to authorize the admission of the records into evidence.

Again, in the same case, a witness testified that

that the same is a book of original entries, and that the entries therein were made by himself, and are just and true; or were made *** by a disinterested person, a non-resident of the State at the time of the trial, and were made by such *** in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account book and entries shall be admitted as evidence in the cause."

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he worked in a mine and received a pay envelope bearing certain words and it was held that the admission of this testimony was incompetent because no showing was made that the envelopes themselves containing the printed words could not be produced.

In West Chicago Street Railway Co. vs Moras 111 Ill. App. 531 a witness identified a certain book of her employers and stated the same was a book of original entry kept by herself and another clerk who was not called, and that the entries in the book were made under the witness' supervision. She then identified certain entries in the book and the entries were offered and admitted in evidence but such admission in evidence was held to be error *** and thecourt held that it could not be admitted into evidence until evidence had been produced that the entries in the books were true and correct.

In Jackson vs Glos 249 Ill. 388 Page 391 the court said: "It has never been considered that books of account admissible in evidence, when proved to have been made in the ordinary course of business, can be admitted without proof of that fact." (House vs Beak 141 Ill. 290).

In Baretti vs Theurer, et al 206 Ill. App. 164 it was held that the testimony of an agent of a corporation that the corporation's books showed that the complainant owed such corporation certain moneys was not entitled to much weight where such witness also testified he did not keep the books or receive the orders for the goods sold and had no personal knowledge of the transaction.

Many other authorities to the same effect might be cited but would serve no useful purpose.

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This question is not new in this state. The law is well established that the testimony of an auditor as to the items in any such books, if admissible at all, is admissible only upon the theory that such witness is testifying as an expert (and then only for the purpose of assisting the court). Before any such testimony as to the items of such books are admissible upon any theory it is imperative that the authenticity of the books themselves must be established by competent evidence and the testimony of any person, even though he be an auditor, who made none of the entries, knows nothing of the facts concerning the same, except as contained in the books, or not in any way connected therewith, is not competent to establish the authenticity of such books and records.

In LeRoy State Bank vs Keenan's Bank 337 Ill. 173 P. 191 the court said: "While the material contents of an existing book of original entry which is obtainable can not be proved by parol testimony, because the book is the best evidence, yet where the originals consist of numerous documents, books, papers or records which can not conveniently be examined in court and the fact to be proved is the general result of the whole collection, any competent witness who has examined the originals may testify as to such result, provided it is capable of being ascertained by calculation. (Inter-State Finance Corp. vs Commercial Jewelry Co. 280 Ill. 116; People vs Gerold 265 Ill. 448). It is in the discretion of the court to admit such statements or schedules of figures or the results of the examination of numerous documents or account books to be introduced in evidence, such statements, schedules or results to be verified by the testimony of the witness by whom they were prepared, allowing the adverse party an opportunity to exmaine them before they are admitted in evidence and to examine the witness from the

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original books, where such books are accessible. (People vs Sawhill 299 Ill. 393). While the result of the examination of voluminous documents, writings, records and books may be proved by expert accountants or other competent person who had made the examination, the documents, records or books upon which the examination is based must be of such a character as to be themselves admissible in evidence. *** It was therefore necessary that the books and papers which the expert accountants examined should themselves have been competent evidence. In order to render an account book admissible in evidence it is essential that proof as satisfactory as the transactions are under the circumstances reasonably susceptible of, shall be given that the entries made are correctly recorded. (People vs Small 319 Ill. 437; Chisholm vs Beaman Machine Co. 160 Ill. 101; House vs Beak 141 Ill. 290). Where the testimony of a witness who made the entries is not available it is competent to establish the authenticity of the book by other evidence. The only evidence produced of the authenticity of the books which the accountants examined is the testimony of the cashier of the LeRoy Bank. He did not become cashier until three months after the making of the contract and the transfer of the assets to that bank. He did not make all the entries in the books. He did not testify, and could not testify, to the correctness of all those entries. Entries were made by the assistant cashier and other persons whose names were mentioned in the cashier's testimony, but they were not called to show that the entries were correctly made and there was no testimony that they were not available. Exhibit A-20, which was used in reaching the results arrived at by the accountants, was in a large part not a book of original entry but was, so far as more than half of the period which it purported to cover was concerned,

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copied from other books to whose authenticity and correctness no one testified. For these reasons the books were not admitted in evidence. The conclusion of the accountants, however, based on these books, which were not so verified as to make them competent evidence, were received and were made the basis of the judgment which was rendered" and upon these facts the Supreme Court of this State reversed the judgment of the trial court in that case.

So it must be held here that before the alleged book accounts or any entries therein were admissible in evidence, preliminary testimony must be made to show that (a) they are in fact the books of the complainant; (b) that they are books of original entry; (c) that the entries or transactions therein recorded are true and correct and (d) that the same were recorded in the regular course of business, (Kibbe vs Bancroft 77 Ill. 18; Taliaferro vs Ives 51 Ill. 247; Dickson vs Kuwanee Electric Light & Motor Co. 53 Ill. App. 379; (e) at the time of the transaction (Hill vs Sommer 55 Ill. App. 345) (f) by a person authorized to make the same.

No such proof was offered by the complainant. It therefore follows that the admission of the alleged books of complainant or copies thereof in evidence herein was error and can not be sustained. Likewise the testimony of the auditor witness is wholly incompetent for any purpose whatever, insofar as it pertains to any entries in the alleged book accounts and any conclusions or computations made therefrom.

It is an elementary rule of law that a complainant in any case has the burden of proving the material allegations contained in his bill of complaint. The entire complaint in this case is predicated upon alleged conspiracy and fraud. Every allegation of damage is that "it was a part of the afore-

copied from other books to whose authenticity and accuracy no one testified. For these reasons the books were not admitted in evidence. The conclusion of the accountants, however, based on these books, which were not so verified as to make them competent evidence, were received and were made the basis of the judgment which was rendered" and upon those facts the Supreme Court of this State reversed the judgment of the trial court in that case.

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said fraudulent, unlawful and secret policy, plan, scheme and conspiracy" etc., or "in furtherance of aforesaid plan, scheme and conspiracy" etc. This suit being predicated upon conspiracy and fraud it is incumbent upon the complainant to furnish definite proof of such allegations.

A conspiracy at common law has been defined, in short, as "an agreement or combination formed between two or more persons to do an unlawful act or to do a lawful act by an unlawful means." (Franklin Union vs People 220 Ill. 355 P. 376.) This definition is clear and unambiguous and doubtless as complete as could be given.

We have searched the record in this case diligently and have failed to find the slightest evidence of theexistence or formation of a conspiracy or of any fraud or mismanagement of the complainant company. There could, of course, be no conspiracy without conspirators, yet the record herein is entirely silent as to any proof of identity of conspirators.

The courts have on numerous occasions laid down the rule that "fraud will not be presumed but must be proven like any other fact by clear and convincing testimony" (Carter vs Carter 283 Ill. 324; Union National Bank vs State National Bank 168 Ill. 256; Huiskamp vs Moline Wagon Company 121 U. S. 310; Hatch vs Jordan 74 Ill. 414; O'Neal vs Boone 82 Ill. 589; Schroeder vs Walsh 120 Ill. 403). "Something more than mere suspicion is required to prove allegations of fraud. The evidence must be clear and cogent and must leave the mind well satisfied that the allegations are true." (Shinn vs Shinn 91 Ill. 477). "If the motives and designs of the parties charged with fraud or collusion may be traced to an honest and legitimate source equally as to a corrupt one, the former explanation ought to be preferred." (McConnell vs

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Wilcox 1 Scam. 344). "Fraud is never presumed when transactions may be fairly reconciled with honesty, and if the weight of the evidence is in favor of an honest motive that conclusion should always be adopted." (Mey vs Gulliman 105 Ill. 272; Bowden vs Bowden 75 Ill. 143; Sawyer vs Nelson 160 Ill. 629; Brady vs Cole 164 Ill. 116.)

From these authorities it must be apparent that the burden of proving the fraud alleged is upon the complainant herein and this it has wholly failed to do by any evidence whatever.

The only fact proven by the evidence offered - taken in the most favorable light - is the fact that the complainant actually and in good faith loaned money to the defendant as it did to other persons or institutions. We do not understand it to be the law that the lending of money to another is in itself a fraudulent act, an unlawful act or an act performed in an unlawful manner. The complainant received interest at the rate of five per cent per annum for all moneys loaned to the defendant and this is not only a lawful rate of interest in this State but is a greater rate of interest than the complainant received from other sources.

Money is commonly loaned for the purpose of earning interest and the evidence herein, if it proves anything at all, clearly establishes the fact that the money of the complainant so loaned to defendant was loaned for such purpose. Such sums as were loaned to the defendant were more profitable to the complainant than the moneys it had loaned to others.

The point is made by complainant that it was without power to loan money to the Illinois Oil Company. If this were true, it would likewise have been without power to have loaned moneys to the various banks and institutions or to the United

Illinois Reports, 1941). Proof is never required that transactions may be fairly recognized with honesty, and if the weight of the evidence is in favor of an honest motive that conclusion should always be adopted." (Ney vs Smithson 308 Ill. 272; Bowden vs Bowden 76 Ill. 165; Beaver vs Nelson 100 Ill. 279; Grady vs Dale 124 Ill. 112.)

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States Government when it purchased bonds. It is probably true, that a corporation organized for the purpose of engaging in the oil business in some of its various lines of endeavor, could not engage generally in the loaning of money as a business, but industrial corporations, whatever the purpose of their organization, have implied power to loan such of its moneys as arenot immediately needed in its own business until such time as the same are needed. (Kraft vs West Side Brewery Co. 219 Ill. 205; Western Tel. Mfg. Co. vs Foley 150 Ill. App. 343). The loans to the defendant would indicate an exercise of good judgment on the part of the management of comolainant. Certainly it wholly fails to establish fraud, conspiracy or bad faith. It is not the policy of the law to compel or require any business, corporate or otherwise, to keep its idle moneys unproductive. Good judgment as well as common sense would require otherwise.

Complainant next contends that the defendant held the money as a trustee for the complainant. No evidence of any sort sustains such contention and we find nothing in the record herein to warrant the assertion. The loaning of money does not create the relation of trustee and cestui que trust between the lender and the borrower. It would be a strange situation if a lender could loan his money for compensation and thereby create the relationship of debtor and creditor and after he had been fullypaid all the moneys so loaned, together with the stipulated compensation (interest), he could then be permitted to claim that he was a cestui que trust and entitled to an additional compensation because the borrower may have made profit. Such is not the law.

The point is also made that the two companies were under the control of the same officers and directors. The evidence

States Government than it purchased bonds. It is reasonably true, that a corporation organized for the purpose of engaging in the oil business in some of its various lines of endeavor, could not engage generally in the loaning of money as a business, but industrial corporations, whatever the purpose of their organization, have implied power to loan such of its money as cannot immediately needed in its own business until such time as the same are needed. (Kraft vs West Side Brewery Co. 92 Ill. 205; Western Tel. Mfg. Co. vs Foley 150 Ill. 449. The loans to the defendant would indicate an exercise of good judgment on the part of the management of complainant. Certainly it wholly fails to establish fraud, conspiracy or bad faith. It is not the policy of the law to compel or require any business, corporate or otherwise, to keep its idle money unproductive. Good judgment as well as common sense would require otherwise.

Complainant next contends that the defendant held the money as a trustee for the complainant. No evidence of any sort sustains such contention and we find nothing in the record herein to warrant the assertion. The loaning of money does not create the relation of trustee and cestui que trust between the lender and the borrower. It would be a strange situation if a lender could loan his money for compensation and thereby create the relationship of debtor and creditor and after he had been fully paid all the money so loaned, together with the stipulated compensation (interest), he could then be permitted to claim that he was a cestui que trust and entitled to an additional compensation because the borrower may have made profit. Such is not the law.

The point is also made that the two companies were under the control of the same officers and directors. The evidence

not only absolutely fails to establish such allegations, but on the contrary thereof proves the allegation untrue. It is true that some of the officers of one company were also officers of the other company. It is also true that one company had nine directors and the other company had five directors, but no facts or circumstances are proven in evidence to show any wrongful conduct on the part of either or any of the officers of either of said companies.

Some other questions have been raised but from the conclusion we have reached we deem it unnecessary to discuss them.

The decree of the Circuit Court of Rock Island County is reversed and this cause is remanded to such court with direction to dismiss the bill of complaint herein for want of equity at cost of complainant.

REVERSED AND REMANDED WITH DIRECTIONS.

certainly sufficiently, while on satisfactory allegation, its on the contrary thereof proves the allegation untrue. It is true that some of the officers of one company were also officers of the other company. It is also true that one company had nine directors and the other company had five directors, but no facts or circumstances are proven in evidence to give any fraudulent weighing on the part of either or any of the officers of either of said companies.

Some other questions have been raised but from the consideration we have reached we deem it unnecessary to discuss them.

The decree of the District Court of Cass County is reversed and this cause is remanded for proceedings in accordance to findings the Bill of Complaint herein for want of equity as case of Dismissment.

MOTION FOR REHEARING DENIED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31)

8507

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8507 A. #2

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM A.D. 1932.

JENNIE F. WHITE,
Defendant in Error,

vs.

FRANK M. WHITE,
Plaintiff in Error.

Writ of error to Circuit Court DuPage County.

Baldwin, J.

* * * * * * * *

Jennie F. White, Defendant in Error, hereinafter called Complainant, filed her bill against Frank M. White, her husband, Plaintiff in Error, hereinafter called Defendant, in the Circuit Court of DuPage County, on September 16, 1929, praying for separate maintenance and alleged therein as cause for the decree in her favor that the Defendant had among other things struck her and had deserted and absented himself fromher. She alleged that he was painting contractor and that he owned various pieces of real estate. She also prayed for a writ of ne exeat republica and an injunction. The latter two writs were granted, but are not important to the decision of this case. After several preliminary proceedings in the case, including change of counsel for the defendant, finally an answer was filed denying the allegation in the bill and the defendant demanded a jury trial.

The case was tried before the Court and jury and four issues of fact were submitted, three of which wereanswered by the jury as follows, andthe fourth was not answered: - -

"1. Did the defendant desert the complainant without fault on the part of the complainant?

Answer: Yes.

2. Did the defendant, Frank M. White, during the month of December A. D. 1928, grab the complainant by the throat and severely choke her?

Answer: No.

3. Did the defendant during the month of December, A. D. 1928, strike the complainant a violent blow upon her right wrist with his fist?

Answer: Yes.

4. Did the defendant, during the month of December, A. D. 1928, break down the door leading to the bedroom of the complainant and insist upon the complainant having unnatural relations with the defendant?

Answer: _____"

At the trial the witnesses for the complainant were C. H. Allen, a real estate man; August Nelson and Emil Hammer, roomers and boarders at the home of complainant, and herself. The defendant was the only witness in his behalf.

The interrogatories submitted to the jury being answered favorably with regard to the complainant's contention, the court followed this verdict, entered an order finding issues for complainant and ordered the defendant to pay $90.00 a month for her support and maintenance and upon an accounting which appeared in the trial from the testimony of the witnesses, ordered the defendant to pay back to the complainant certain sums of money which she claims due her as of her separate estate and allowed solicitor's fees for complainant in the sum of $900.00.

The defendant filed an assignment of errors claiming that error was committed in admitting evidence offered on behalf of

the complainant and in refusing to admit evidence offered on part of defendant, also that court erred in finding issues for the complainant. The complainant contends that the defendant failed to object to oral evidence at the trial and that he can not now object to it; that the defendant's exhibit "A", which was offered in evidence, does not appear in the record and therefore, that it can not be properly considered; that the findings in the decree on the merits of the case are fully supported by the evidence; that the testimony in the record with reference to the amounts claimed by complainant from defendant were not objected to by the defendant at the trial and therefore are properly a part of the decree under the prayer for general relief and no particular assignment of error is made as to this portion of the decree, therefore, it can not be considered here; that a jruy of twelve men heard the case, saw the witnesses and found especially upon the main issues of the case in favor of complainant; that the businesses in which they were respectively engaged were not joint ventures, but were each conducted separately by the parties prior to marriage and since.

The testimony offered, as appears from the record, seems to indicate that prior to the marriage, complainant conducted a rooming and boarding house at her home at 246 South Kenilworth Avenue, Elmhurst, Illinois; that the defendant prior to the marriage conducted a rooming house at 174 St. Charles Road, Elmhurst, Illinois, which was about 2½ blocks from the place where the complainant conducted her place and, that, after the marriage, complainant continued to conduct her separate business and defendant continued to operate his separate business. While denied in part by the defendant, we think the proof shows that about the latter part of February 1928 or two weeks after the marriage, the defendant indulged in violent outbursts of temper and said many improper things; that he was going to get rid of

the complainant and in rejecting to admit evidence offered on behalf of defendant, also that court erred in finding issues for the complainant. The complainant contends that the defendant failed to object to oral evidence at the trial and that he can not now object to it; that the defendant's exhibit "A", which was offered in evidence, does not appear in the record and therefore, that it can not be properly considered; that the findings in the decree on the merits of the case are fully supported by the evidence; that the testimony in the record with reference to the amounts claimed by complainant from defendant were not objected to by the defendant at the trial and therefore are properly a part of the decree under the prayer for general relief and no mathematical assignment of error is made as to this portion of the decree. Therefore, it can not be considered here; that a jury of twelve was found the case, saw the witnesses and found especially upon the main issues of the case in favor of complainant; that the instances in which they were respectively conveyed also not juge relative, but were such as contained especially in the relation upon in marriage and since.

The testimony offered, as appears from the record, seems to indicate that prior to the marriage, complainant conducted a rooming and boarding house at her home at 265 North Chillicothe Avenue, Kankakee, Illinois; that the defendant owns a 1-1/2 story marriage conducted a rooming house at 144 St. Charles road, Bradley, Illinois, which was about 2-1/2 blocks from the place where the complainant conducted her place and, that, after the marriage, complainant continued to conduct her separate business and defendant continued to operate his separate business. Title issued in part by the defendant, we think the proof shows that about the latter part of January 1919 or the week after the marriage, the defendant indulged in violent outbursts of temper and said many improper things; that he was going to rob and of

her and she could go home on the train. After this quarrel they made up and lived together for a while, then again on the 14th of July, 1928 he came to her room and there was considerable argument, after which they again made up. About August 1, 1928 they again engaged in a heated controversy and boisterous and profane language was used and the defendant grabbed the complainant by the shoulder and jerked her so that she fell on to the floor. Quarrels between these people occurred on the 12th day of August 1928 at which time he said he would finish her and when he said that he was standing near the dresser drawer where his gun was located and again on the 13th of August they had a quarrel and the upshot of that was he said he was going to leave her and packed his goods and left and from this day on Mrs. White continued to reside at her home on Kenilworth Avenue and White lived at his own rooming house on St. Charles Road. Later about the 1st of September of the same year, defendant had sold some property and wanted his wife to sign certain papers and asked that she sign papers and suggested that they continue to live together again and he would conduct himself properly and after the papers were signed he told her he had no more use for her. Several times after that defendant was selling property and each time asked his wife to sign papers and she did. In December of 1928 during an argument defendant got very angry and started to leave the room and he put his foot in the door so she could not close it and she had her hand on the door and he kept beating the door and pounding her hand and finally broke the door down. They went together again and it was not long until their quarrels were so boisterous that it awakened the roomers in the house and they came up stairs and complained. The complainant testified that these quarrels and outbreaks were brought on by defendant without her fault, while defendant claimed that she provoked him

and refused to perform her duties as his wife. This testimony, both on the part of complainant and of her roomers and boarders corroborating her version of the matter, as well as the testimony on the part of defendant were all heard by the jury and the answers to the question upon these issues have already been referred to.

We have read this testimony carefully and are of the opinion that the verdict of the jury upon those questions is amply sustained by the record.

With reference to the property and income of the defendant and plaintiff and other financial matters in this case, it seems from the record that from December 1927 to September 1928 the complainant loaned to defendant a total of $640.00 and that during the period from February 25, 1928 to July 21, 1928 defendant collected $6,160.94 from Mrs. White's roomers, he having been authorized to do so shortly after the marriage and that out of this money, so collected, he paid expenses for conducting the rooming house amounting to $4400.35 and that he gave to complainant a paper showing the expenses which left an amount of $1,757.59 for which he did not account. Evidence was offered on behalf of complainant of a Hospital bill incurred by her after the marriage in the sum of $477.00 and two doctor bills of $200.00 each and further that the defendant refused to pay temporary alimony under the order of the court from September 30, 1929 to and including May 12, 1930, amounting to $330.00. The complainant showed that from her property she had received from July 1928 to May 1930 the sum of $13,302.65 and that the expenditures during the same period amounted to $14,537.92. Upon these facts the court incorporated in the decree that the defendant should repay to the complainant these various sums, including also a solicitor's fee in the temporary alimony matter of $25.00 or a total of $3,628.59.

The record discloses, as we view it from a fair consideration thereof, that based upon the health and ability of defendant and upon his income from his various properties, also taking into consideration her income and striking a fair amount to be paid, if any, by defendant to complainant, that $80.00 a month was considered fair by the court and so ordered. In addition thereto, the court ordered that the defendant pay the sum of $800.00 for her reasonable solicitor's fee. No assignment of error was filed by defendant upon this question and therefore, it is not considered. The claim of the defendant that the court erred in admitting evidence offered is probably restricted to what are called complainant's exhibits 1 to 28 and the oral testimony with reference thereto. These exhibits were leaves of a book in which complainant kept a list of her roomers and boarders in her house and it was testified that these exhibits show the name of boarders and roomers and amount paid and that entries were in her own handwriting and made at the time at which the acts so recorded occurred and exhibit 18 was a paper summarizing the information contained in the previous exhibits. The only objection urged by defendant at the time these were offered was that they were immaterial for the reason that it was not proper for a court to take an accounting between husband and wife of the income from the proceeds of such a venture as the facts disclose in this case, that is, theincome from the respective boarding and rooming houses owned by the parties respectively.

We think the testimony shows clearly that these various properties were conducted separately by the respective parties to this law suit as of their own separate estate. The one on St. Charles was run and conducted by the defendant and the one on Kenilworth Avenue by the complainant, but it is also true

that for a portion of the period that these parties lived together, the defendant for and on behalf of the complainant conducted and managed her rooming house, but the evidence further shows that for the period he so conducted her rooming house he gave her a slip of paper which had thereon the details of such management. The complainant also offered in evidence certain checks against her account at the bank and a summary of these checks for the purpose of showing certain payments to the defendant by her and for which she now asks the court to order the defendant to return to her, and the record discloses that there was no valid objection made to the introduction of these last exhibits. The record discloses that the only objection to these exhibits was that they were improper, immaterial and irrelevant without specifications.

The defendant claims that a wife can not demand an accounting from the husband when the husband and wife have conducted a business jointly and that the right to receive and recover money due from roomers and boarders is in the husband and cites cases in support of this contention, but a careful examination of those cases indicates that the facts therein are not in any way similar to the facts in the instant case. We believe the evidence discloses that each of these parties owned their respective places and conducted the respective businesses separately and prior to the marriage, during the marriage and after separation, these respective businesses were so conducted; each was therefore entitled to the separate income and were liable for their respective expenses and in this respect and as to such matters, the same as strangers each to the other. Patton vs. Patton 75 Ill. 446.

We think therefore and so state the law to be, that where the business, such as this was conducted separately by

the parties, even though they be husband and wife, even though the husband acts for the wife in the management of the wife's separate property, this does not entitle the husband to have the receipts of such separate property as his own property unless some special agreement upon that question appears, and the court below was right in overruling the objection of the defendant upon this ground.

The defendant acted as agent for his wife in the conduct of the affairs of her rooming house and in the making of such appointment she had a perfect right, inasmuch as it was her separate property and any receipts and disbursements during that period were a proper subject for an accounting between them in this action. The only objection that was made below was that it was not proper to have an accounting between husband and wife and that objection was based upon the assumption that the property was joint property. The authorities in support of this contention as cited therefore have no application to the instant case, no other objection having been made and the bill praying for general relief.

Defendant further contends that the court erred in not admitting certain testimony offered on behalf of defendant. This probably refers to the sustained objection to the offer into evidence of defendant's exhibit "A".

Nowhere in the record or abstract does this exhibit appear and the only way we have of knowing anything about it is in excerpts from the statement of brief and argument of defendant's counsel.

We can not therefore pass upon this question because it is not properly before us. McDole vs. German-American National Bank 204 Illinois App. 21 at page 22.

the marriage, even though title be vested and still, even though the husband acts for his wife in the management of the wife's separate property. This does not entitle the husband to have the proceeds of such separate property as his own property unless some special agreement upon that subject appears, and the court below was right in refusing the propositions of the defendant upon this ground.

The defendant acted as agent for his wife in the conduct of the affairs of her rooming house and in the making of such expenditures she had a perfect right, inasmuch as it was her separate property and any receipts and disbursements during that period were a proper subject for an accounting between them in this action. The only objection that was made below was that it was not proper to have an accounting between husband and wife and that objection was based upon the assumption that the property was joint property. The authorities in support of this contention as cited therefore have no application to the instant case, no other objection having been made and the bill praying for general relief.

Defendant further contends that the court erred in not admitting certain testimony offered on behalf of defendant. This evidently relates to the sustained objection to the offer into evidence of defendant's exhibit "4".

Nothing in the record or abstract upon this exhibit appears and the only way we have of learning what it is is in excerpts from the statement of brief and argument of defendant's counsel.

We are not therefore passing upon this question because it is not properly before us. Schultz vs. German-American Insurance Co. 202 Illinois App. 73 at page 77.

A number of alleged errors are recited and attempted to be argued in defendant's brief including the power of the court to take an accounting, the question of doctor bill s and attorney fees, but no proper assignment of error has been made with reference to these questions except as already noted and we therefore can not pass upon them. (McDole vs German-American National Bank, supra).

It is not the province of a reviewing court to search the record for reasons argued but not assigned in order to reverse a decree.

We have carefully examined the record in this case with the thought in mind that defendant demanded a jury trial, which was had, and these men so selected heard all the evidence offered in the case and upon the vital questions as to whether or not a meritorious case has been made out by the complainant. The jury found for the complainant; the Court also heard all of the testimony and inarriving at a decree in this matter the court subscribed to the opinion of the jury that complainant had made out her case and was entitled to relief upon the separate maintenance proposition. Under such circumstances such findings will not be disturbed on appeal unless clearly and manifestly against the preponderance of the evidence and we are not prepared to say that complainant has not made out her case by a preponderance of the evidence. Delaney vs Delaney 175 Illinois 187. In the case of Rifkin and Hart vs. Buchsbaum and Company 257 Illinois Appellate 473 the Court said: --

> "A judgment resulting from conflicting evidence on a question of facts will not be disturbed on appeal where the reviewing court can find nothing from the record that will warrant it in coming to a different conclusion than that reached by the trial court."

And again in the case of Arliskas vs. Arliskas 343 Illinois

A number of alleged errors are pointed out attempted to be argued in defendant's brief including the power of the court to take an accounting, the question of doctor bill & and attorney fees, but no proper assignment of error has been made with reference to these questions except as already noted and we therefore can not look upon them. Infact as cross-appellee defendant here, argues.

It is not the province of a reviewing court to search the record for reasons argued but not assigned in order to reverse a decree.

We have carefully examined the record in this case with the thought in mind that defendant demanded a jury trial, which was had, and these men so selected heard all the evidence offered in the case and upon the vital questions as to whether or not a meritorious case has been made out by the complainant. The jury found for the complainant; the court then heard all of the evidence and certifying on a decree in this matter the court submitted to the opinion of the jury that complainant had made out her case and was entitled to relief upon the separate main-tenance proposition. Under such circumstances such findings will not be disturbed on appeal unless clearly and satisfactorily shown the preponderance of the evidence not as we are not convinced that the complainant has not made out her case by a preponderance of the evidence. Delaney vs Delaney 175 Illinois 187. In the case of Sidlin and Dent vs. Washburn and Company 177 Illinois Appellate 177 the Court said: --

> "A judgment resulting from conflicting evidence on a question of facts will not be disturbed on appeal where the reviewing court can find nothing from the record that will warrant it in saying to a different conclusion than that reached by the trial court."

And again in the case of Aylesbee vs. Aylesbee 345 Illinois

Supreme 112, our Supreme court held that: --

> "Where the Chancellor saw the witnesses and heard them testify, a court of review will not disturb findings of facts, unless it is apparent that error has been committed."

to the same effect also is Ohio Oil Company vs Reichert 343 Illinois 560; Krabenhoft vs. Gossau 337 Illinois 396, and in another case (Shekerjian vs. Shekerjian 346 Illinois 101) where the jury and the Chancellor heard testimony, the Supreme Court of our States held that: --

> "The result and finding and decree will not be distrubed on review unless manifestly against the weight of the evidence."

We are of the opinion that the finding of the jury and the decree of the court is in accordance with and supported by a preponderance of the evidence as disclosed by the record and therefore the decree of the Circuit Court should be affirmed, which is accordingly done.

AFFIRMED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(65027—1M—9-31) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 23 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8512 Agenda No. 5

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1932

E. D. Risser,

Appellant

vs.

Frank Bishopp, et al,

Appellees

Appeal from the Circuit Court of Iroquois County

BALDWIN, J.

This is an appeal prosecuted by E. D. Risser, appellant (Complainant in trial court) to reverse a decree entered herein by the Circuit Court of Iroquois County.

On April 11th, 1917, E.D. Risser, William Dale and Frank Bishopp formed a co-partnership for the purpose of building a grain elevator and of operating a grain business therein at Sheldon, Illinois. By the terms of the written agreement the business was to be conducted under the name of Bishopp Grain Company; the profits and losses were to be shared by the parties in the following proportions: Frank Bishopp one-half; William Dale and E. D. Risser each one-fourth. The money for the construction of the elevator building was to be furnished by Risser and Dale. The co-partnership was to purchase certain material and machinery to be used therein from Bishopp for the sum of $800.00. Bishopp was to be the manager of the business and receive for his services a salary of $75.00 per month and he was also to receive $2.00 per month for the rent of a building to be occupied by the office. He was also given the privilege of purchasing a one-half interest in the elevator building upon payment of a sum equal to one-

General No. 8812 Agenda No. 5

IN THE APPELLATE COURT OF ILLINOIS

[illegible] District

MAY TERM, A. D. 1928

E. D. Bisser,

Appellant

vs.

Frank Bishopp, et al,

Appellees

Appeal from the Circuit Court

of Iroquois County

MR. JUSTICE [illegible] J.

This is an appeal prosecuted by E. D. Bisser, appellant (complainant in trial court) to reverse a decree entered herein by the Circuit Court of Iroquois County.

On April 11th, 1917, E.D. Bisser, William Dale and Frank Bishopp formed a co-partnership for the purpose of building a grain elevator and of operating a grain business therein at Sheldon, Illinois. By the terms of the written agreement the business was to be conducted under the name of Bishopp Grain Company; the profits and losses were to be shared by the parties in the following proportions: Frank Bishopp one-half; William Dale and E. D. Bisser each one-fourth. The money for the construction of the elevator building was to be furnished by Bisser and Dale. The co-partnership was to purchase certain material and machinery to be used therein from Bishopp for the sum of $600.00. Bishopp was to be the manager of the business and receive for his services a salary of $75.00 per month and he was also to receive $5.00 per month for the rent of a building to be occupied by his office. He was also given the privilege of purchasing a one-half interest in the elevator building upon payment of a sum equal to one-

half its cost. Risser and Dale were, however, to be the owners of the elevator building until such purchase by Bishopp was actually made.

By mutual agreement between the parties, this agreement was cancelled February 1st, 1918 and a new agreement substituted therefor to be effective as of April 11th, 1917, by the terms of which the profits and losses of such business were to be shared equally. Bishopp was to receive for his services as manager a salary of $125.00 per month; Risser and Dale were to furnish necessary money to operate the business and receive interest at six per cent per annum out of the profits of the business upon such moneys so furnished. By another agreement (the purpose of which is not entirely clear) dated March 2nd, 1918 Frank Bishopp deposited 3015 shares of stock of the Bishopp Hominy Company with the Bank of Sheldon to be delivered to Risser and Dale upon their payment to such bank on account of Bishopp in the sum of $12,513.00. Second parties likewise deposited with such bank 1165 shares of such stock to be delivered to Bishopp if they failed to pay the sum of $12,513.00. Another agreement, dated May 3, 1919, was executed and by its terms was declared to be in lieu of the one of March 2, 1918. The chief difference, however, appears to be merely the substitution of stock of the Bishopp Cereal Company for that of Bishopp Hominy Company.

The Bishopp Hominy Company was a corporation owning a mill at Sheldon, Illinois. The stock of such corporation was largely owned by Frank Bishopp. This mill had not been operation for some years. Some time after the organization of the co-partnership business the parties orally agreed to take up the operation of the mill. No written agreement in relation thereto appears to have been made between the parties

half its cost. Hisser and Dale were, however, to be the owners of the elevator building until such purchase by Bishopp was actually made.

By mutual agreement between the parties, this agreement was cancelled February 1st, 1918 and a new agreement substituted therefor to be effective as of April 11th, 1917, by the terms of which the profits and losses of such business were to be shared equally. Bishopp was to receive for his services as manager a salary of $125.00 per month; Hisser and Dale were to furnish necessary money to operate the business and receive interest at six per cent per annum out of the profits of the business upon such moneys so furnished. By another agreement (the purpose of which is not entirely clear) dated March 2nd, 1918 Frank Bishopp deposited 3015 shares of stock of the Bishopp Mining Company with the Bank of Sheldon to be delivered to Hisser and Dale upon their payment to such bank on account of Bishopp in the sum of $12,312.00. Second parties likewise deposited with such bank 1165 shares of such stock to be delivered to Bishopp if they failed to pay the sum of $12,312.00. Another agreement, dated May 3, 1918, was executed and by its terms was declared to be in lieu of the one of March 2, 1918. The only difference, however, appears to be merely the substitution of stock of the Bishopp Detroit Company for that of Bishopp Mining Company.

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except the reference that "in consideration E. D. Risser and Wm. Dale to finance the operation of the mill of the Bishopp Hominy Company" etc., contained in the contract of February 1, 1918 above mentioned. Whatever the exact terms of the agreement may have been, the parties did take up the operation of such mill and did purchase a portion of the stock of such corporation. Thereafter they organized a new corporation under the name of Bishopp Cereal Company to acquire and continue the business of the Bishopp Hominy Company. The transfer was made from the Bishopp Hominy Company to the Bishopp Cereal Company and the business continued under the name of Bishopp Cereal Company. The owners of the co-partnership business were also the officers of the corporation.

The grain business and milling business were largely conducted from one office. The books of the respective businesses were kept by book-keepers under the control and direction of one of the partners but the accounts of the respective companies appear to have been considerably intermingled. The businesses ultimately proved unprofitable and were discontinued.

During the year 1921 the complainant filed this suit for accounting and dissolution of the partnership in the Circuit Court of Iroquois County. The facts alleged in the bill of complaint were substantially as herein set forth, together with certain allegations that losses had occurred and that Bishopp had failed and refused to pay his share of same. Upon issues being joined the cause was referred to the Master in Chancery, who heard the evidence submitted and made a report of his findings to the court. On June 6, 1923 a supplemental bill was filed and the cause again referred to the Master in Chancery who received additional evidence and filed his report thereof in the Circuit Court. After the filing of the report

except the reference that "in consideration H. D. Wiener and Wm. Dale to finance the operation of the mill of the Bishopp Milling Company" etc., contained in the contract of February 1, 1918 above mentioned. Whatever the exact terms of the agreement may have been, the parties did take up the operation of such mill and did purchase a portion of the stock of such corporation. Thereafter they organized a new corporation under the name of Bishopp Cereal Company to acquire and continue the business of the Bishopp Milling Company. The transfer was made from the Bishopp Milling Company to the Bishopp Cereal Company and the business continued under the name of Bishopp Cereal Company. The owners of the co-partnership business were also the officers of the corporation.

The grain business and milling business were largely conducted from one office. The books of the respective businesses were kept by book-keepers under the control and direction of one of the partners but the accounts of the respective companies appear to have been considerably intermingled. The businesses ultimately proved unprofitable and were discontinued.

During the year 1921 the complainant filed this suit for accounting and dissolution of the partnership in the Circuit Court of Iroquois County. The facts alleged in the bill of complaint were substantially as herein set forth, together with certain allegations that losses had occurred and that Bishopp had failed and refused to pay his share of same. Upon issues being joined the cause was referred to one master in Chancery, who heard the evidence submitted and made a report of his findings to the court. On June 6, 1922 a supplemental bill was filed and the cause again referred to the Master in Chancery who received additional evidence and filed his report thereof in the Circuit Court. After the filing of the report

of the Master in Chancery upon the second reference the cause was referred to a special Master in Chancery, who received evidence in the cause in accordance with the directions of the order of reference.

Among the witnesses called was an accountant who had audited the books of the respective companies and who presented his audit and gave testimony in relation thereto. Such Special Master filed his report in the Court in May 1929.

Objections to such Master's report were over-ruled. Thereafter upon hearing by the court the exceptions to the report were overruled, and a decree entered in this cause in accordance with the recommendations of such Special Master in Chancery. From this decree E. D. Risser prosecuted this appeal and he has assigned as cause for reversal various errors, which we deem unnecessary to discuss separately.

The evidence in this case is rather voluminous and includes an intricate series of accounts. These accounts were examined by the Master who employed an accountant, the competency of whom is unquestioned by the record herein, to assist in the separating and auditing of the accounts of such businesses. The Master's report and decree of the court herein are predicated largely upon the facts produced by such audit. The Master in reaching his conclusions herein not only had the actual records themselves for examination with the aid of the auditor, but he also had the advantage of seeing and hearing the respective witnesses testify and was able to apply the testimony to the actual records before him and thereby to determine the correctness of the evidence presented. He was thus in the best position to determine the credibility of the witnesses and of the weight to be attached to their testimony. Then too, the Court had the advantage of examining all the

of the Master in Chancery upon the second reference the cause was referred to a special Master in Chancery, who received evidence in the cause in accordance with the directions of the order of reference.

Among the witnesses called was an accountant who had audited the books of the respective companies and who presented his audit and gave testimony in relation thereto. Such Special Master filed his report in the Court in May 1899. Objections to said Master's report were sustained. Thereafter upon hearing by the court the exceptions to the report were overruled, and a decree entered in this cause in accordance with the recommendations of such Special Master in Chancery. From this decree E. D. Risser prosecuted this appeal and he has assigned as cause for reversal various errors, which we deem unnecessary to discuss separately.

The evidence in this case is rather voluminous and includes an intricate series of accounts. These accounts were examined by the Master who employed an accountant, the competency of whom is unquestioned by the record herein, to assist in the separating and auditing of the accounts of such businesses. The Master's report and decree of the court herein are predicated largely upon the facts produced by such audit. The Master in rendering his conclusions herein not only had the actual records themselves for examination with the aid of the auditor, but he also had the advantage of seeing and hearing the respective witnesses testify and was able to apply the testimony to the actual records before him and thereby to determine the correctness of the evidence presented. He was thus in the best position to determine the credibility of the witnesses and of who might be adjudged to blame if blame there was, the court had the advantage of examining all the

evidence that was before the Master, the Master's report and the benefit of the arguments and suggestions of counsel and with that before him, he gave judicial assent to the conclusions of the Master and entered a decree.

This case is entirely predicated upon questions of fact which is to be determined from a consideration of all the evidence presented herein and after careful examination of the evidence presented, the various exhibits introduced, the report of the Master and the decree of the court herein, we are of the opinion that the decree of the court entered in this proceeding is correct and that such decree of the Circuit Court should be affirmed.

Finding no error in the record the decree of the Circuit Court of Iroquois County entered herein is hereby affirmed.

AFFIRMED.

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evidence that was before the master, the master's report was the benefit of the arguments and suggestions of counsel and with that before him, he gave judicial consent to the manifestation of the master and entered a decree.

This case is entirely predicated upon questions of law which it is determined from a consideration of all the evidence presented herein and after careful examination of the evidence presented, the various exhibits introduced, the report of the Master and the decree of the court herein, we are of the opinion that the decree of the court entered in this proceeding is correct and that such decree of the Circuit Court should be affirmed.

Finding no error in the record the decree of the Circuit Court of Ingham County entered herein is hereby affirmed.

AFFIRMED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(65027—1M—9-31) 7

1551

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.
Hon. JAMES S. BALDWIN, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 28 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8551 Ag. No. 19

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1932.

State Bank & Trust Company, a corporation, individually and as trustee,
Plaintiff in Error,
vs.
Charles R. Lincoln, et al.,
Defendants in Error.

Writ of Error to Circuit Court, Lake County.

WOLFE. ** P.J.

A writ of error was prosecuted out of this court to review a decree entered by the Circuit Court of Lake County. Plaintiff in error claims that its rights have been prejudiced by the proceeding in the lower court.

The part of the record complained of by the plaintiff in error was a decree of court fixing the rights of each of the parties to the suit and was entered on the 7th day of December, 1931. That part complained of is as follows: "The intervening petitioner, the Waukegan Lumber & Coal Company has a first, prior and paramount lien on the said premises herein above described *** which lien is prior to all liens of all the other parties." The plaintiff in error also complains of the following part of said decree: "Said intervening petitioner, Max Goodman, doing business as the Goodman Electric, has a lien on said premises *** subject, however, to a first and prior lien of said Waukegan Lumber and Coal Company ***. They also object to the following part of the record: "The said complainant, the State Bank & Trust Co., individually, has a lien on said premises *** subject and subordinate to the lien claimed by the Waukegan Lumber & Coal Company and to the claim of Max Goodman, doing business as the Goodman Electric, for the sum of $4016.65*** less the amount equal to the amount of the combined lien claims of the said Waukegan Lumber and Coal Company, and said Max Goodman, doing business as the Goodman Electric*** and that the

No. 5221. No. 11

IN BANC.

IN THE
SUPREME COURT OF IDAHO.

October term, . . . 1922.

State Bank & Trust Company,
corporation, individually and
as trustee,
Plaintiff in error,
vs.
Charles R. Lincoln, et al.,
Defendants in error.

Error. ** 1.2.

A writ of error was prosecuted out of this court to review a decree entered by the district court of Lake County. Plaintiff in error claims that its rights have been prejudiced by the proceeding in the lower court.

The part of the record complained of by the plaintiff in error was a decree of court fixing the rights of each of the parties to the suit and was entered on the 7th day of December, 1921. That part complained of is as follows: "The intervening petitioner, the Wisconsin Lumber & Coal Company has a first, prior and paramount lien on the said premises hereinabove described *** which lien is prior to all liens of all the other parties." The plaintiff in error also complains of the following part of said decree: "Said intervening petitioner, the Coulee, Lake Coeur d'Alene Lumber Company, has a lien on said premises *** subject, however, to a first and prior lien of said Wisconsin Lumber and Coal Company ***. They also object to the following part of the record: "The said complainant, the State Bank & Trust Co., individually, has a lien on said premises *** subject and subordinate to the lien claimed by the Wisconsin Lumber & Coal Company and to the rights of the Coulee, Lake Coeur d'Alene Lumber Co., doing business as the Coulee Lumber Company, and to the rights of the Wisconsin Lumber and Coal Company***. Just the record says: "The record of the said Wisconsin Lumber and Coal Company, and said the Coulee, doing business as the Coulee Lumber Company*** was that the

balance of the amount which is due to the complainants being an amount equal to the combined claims of said Waukegan Lumber and Coal Company and the said Max Goodman, doing business as Goodman Electric *** is a lien on said premises, subject however to the lien claimed by the defendant E. M. Runyard."

The plaintiff in error filed its original bill in this case on December 4th, 1928 and alleges that Charles R. Lincoln borrowed the sum of $3500.00 from the plaintiff in error and executed and delivered to the complainant his two personal notes, one for the sum of $500.00, due three years from date, and one for the sum of $3000.00, due in five years after date, each of said notes to bear interest at the rate of six per cent per annum. At the time the original notes were executed coupon notes representing the amount of interest were also executed. To secure the payment of said notes the said Charles R. Lincoln executed a trust deed conveying certain premises to the plaintiff in error. The trust deed bears the same date as the notes and was filed for record on the 21st day of December, 1928.

It is alleged that E. M. Runyard, individually and as trustee, claims some interest in the premises and has a claim which is unknown to the plaintiff in error. The bill alleges that whatever Runyard's interest is, it is inferior, subordinate and subject to the right of the plaintiff in error. On January 6th, 1930, the bill was amended by the plaintiff in error, and made Max Goodman and the Waukegan Lumber & Coal Company parties defendant to the said bill. Runyard filed his answer but neither admitted nor denied the allegations of the bill of complaint, but demanded strict proof thereof. The answer further set up the execution and delivery of a promissory note in the sum of $825.00, secured by a trust deed on the said premises as and for a junior encumbrance. The said answer further alleges that said written trust deed is a valid and subsisting lien on the premises given to secure the notes of the defendant in error, subject, however, and subordinate to the lien of the trust deed of plaintiff in error.

balance of the amount which is due to the small lender being an amount equal to the combined claims of said mortgagor, Market and Coal Company and the said Ian Goodman, being mortgage on Goodman Electric *** is a lien on said premises, subject however to the lien claimed by the defendant M. K. Murgard."

The plaintiff in error filed its original bill in this case on December 4th, 1933 and alleges that Charles R. Lincoln borrowed the sum of $2800.00 from the plaintiff in error and executed and delivered to the complainant his two personal notes, one for the sum of $500.00, due three years from date, and one for the sum of $2000.00, due in five years after date, each of said notes to bear interest at the rate of six per cent per annum. At the time the [illegible] of interest were also executed. To secure the payment of said notes the said [illegible] R. Lincoln executed a trust deed to certain premises to the plaintiff in error. The trust deed bears the same date as the notes and was filed for record on the 21st day of December, 1928.

It is alleged that M. K. Murgard, individually and as trustee, claims some interest in the premises and has a claim which is unknown to the plaintiff in error. The bill alleges that whatever Murgard's interest is, it is inferior, subordinate and subject to the right of the plaintiff in error. On January 6th, 1930, the bill was amended by the plaintiff in error, and made Ian Goodman and the Jackson Lumber & Coal Company parties defendant to the said bill. Murgard filed his answer but neither admitted nor denied the allegations of the bill of complaint, but demanded strict proof thereof. The answer further set up the execution and delivery of a promissory note in the sum of $838.00, secured by a trust deed on the said premises as and for a junior encumbrance. The said answer further alleges that said written trust deed is a valid and subsisting lien on the premises given to secure the notes of his stockholder in error, Goodman, however, and subordinate to the lien of the trust deed of plaintiff in error.

On March 11th, 1932, an answer in the nature of an intervening petition of the Waukegan Lumber & Coal Company was filed. They neither admit nor deny any of the allegations of the bill of the plaintiff in error, except the allegation regarding the mechanics' lien and all other matters, they demand strict proof thereof. One of the matters set forth in the intervening petition that the said Waukegan Lumber & Coal Co., is as follows: "That on or about the 29th day of October, 1928, the said Charles R. Lincoln was and at the present time is the owner in fee simple of the property described in the original bill of complaint ***; that on or about October 29, 1928, the said Charles R. Lincoln made and entered into an oral agntract with this defendant and intervening petitioner to furnish and deliver lumber and building material for the construction of improvements on said premises as the same were needed." It is then alleged that the lumber and building materials were furnished in accordance with the contract and delivery was commenced on the 29th day of October, 1928, and completed on the 15th day of June, 1929. Said answer and intervening petition also contains an allegation that the lien of the intervening petitioners is prior and superior to the lien of the plaintiff in error.

On March 8th, 1930, Max Goodman, doing business as the Goodman Electric Co., filed an answer to the bill in the nature of an intervening petition claiming that he had a lien on said premises for material furnished and labor done on the premises in the sum of $56.25. The plaintiff in error filed replications to the answers of the different parties and intervening petitioners and issue was jointed on the same. The case was referred to the master in chancery who made his report and a decree was entered fixing the rights of the parties. To such decree the plaintiff in error objects to that part of the decree here-to-fore set out.

It appears from the evidence that Charles L. Lincoln executed and delivered to the State Bank & Trust Company promissory notes in the sum of $3500.00, secured by a deed of trust on certain real estate for the purpose of obtaining a certain construction loan of

December 4, 1928. The trust deed was subsequently recorded on December 21, 1928. On December 5th, 1928, the defendant in error, Eugene Runyard, delivered a warranty deed dated November 7th, 1928, to the Bank as part of the purchase price of said loan and mortgage, dated December 5, 1928, and recorded December 21st, 1928, which said trust deed bears stamped upon its face: "This is a junior mortgage." This trust deed and note secured thereby, which also had stamped upon its face: "This note is secured by a junior mortgage.", were introduced in evidence. The evidence shows that by the terms of the contract entered into by Lincoln and Runyard that Runyard agreed and permitted Lincoln to place a first mortgage of $3500.00 on the property. The record does not show whether Lincoln paid any consideration for this contract other than his promise to pay $3500.00 secured by a second mortgage as provided in the contract.

On the 29th day of October, 1928, the Waukegan Lumber and Coal Company entered into an oral contract with Charles R. Lincoln to furnish lumber and building material necessary to erect a building on the premises. This is supported by the findings of the Master in Chancery and the decree of the court. The plaintiff in error insists that the evidence is not consistent and that there is a conflict of testimony on this point.

On February 15th, 1929, the Waukegan Lumber & Coal Company executed and delivered to the agent of the plaintiff in error a waiver of the lien which the plaintiff in error now claims is a complete waiver of the lien. The waukegan Lumber and Coal Company insists that the waiver is only a partial waiver of their lien, and only for the amount of $1000.00.

During the hearing before the Master the witness Lincoln was permitted to testify regarding the purpose of the mortgage which he gave to the Waukegan Lumber and Coal Company covering the property in this proceeding and other property. Subsequently the Master permitted the witness to be recalled and give testimony which contradicted that previously given. Plaintiff in error claims this was error; that there is no reason why such proceedings were

December 4, 1925. The trust deed was subsequently recorded on December 21, 1925. On December 5th, 1925, the defendants in error, Eugene Runyard, delivered a warranty deed dated November 7th, 1925, to the Bank as part of the purchase price of said loan and mortgage, dated December 5, 1925, and recorded December 21st, 1925, which said trust deed bears stamped upon its face: "This is a junior mortgage." This trust deed and note secured thereby, which also had stamped upon its face: "This note is secured by a junior mortgage.", were introduced in evidence. The evidence shows that by the terms of the contract entered into by Lincoln and Runyard that Runyard agreed and permitted Lincoln to place a first mortgage of $3500.00 on the property. The record does not show whether Lincoln paid any consideration for this contract other than his promise to pay $3500.00 secured by a second mortgage as provided in the contract.

On the 29th day of October, 1925, the Waukegan Lumber and Coal Company entered into an oral contract with Charles A. Lincoln to furnish lumber and building material necessary to erect a building on the premises. This is supported by the findings of the Master in Chancery and the decree of the court. The plaintiff in error insists that the evidence is not consistent and that there is a conflict of testimony on this point.

On February 15th, 1926, the Waukegan Lumber & Coal Company executed and delivered to the agent of the plaintiff in error a waiver of the lien which the plaintiff in error now claims is a complete waiver of the lien. The Waukegan Lumber and Coal Company insists that the waiver is only a partial waiver of their lien, and only for the amount of $[illegible].

During the hearing before the master the witness Harris was permitted to testify regarding the payment of the mortgage which he gave to the Waukegan Lumber and Coal Company covering the property in this proceeding and other property. Subsequently the master permitted the witness to be recalled and give testimony which contradicted that previously given. Plaintiff in error claims this was error; that there is no reason why such proceedings were

had; that there is no explanation of the necessity of recalling the witness. The Master took the proof and heard the testimony of the different witnesses which he reported to the court. It is now contended by the plaintiff in error that the Report was never marked 'filed'. Whatever the fact may be, objections were filed by the defendant and intervening petitioners, Waukegan Lumber & Coal Company, Max Goodman, doing business as Goodman Electric, George W. Wright, plaintiff in error and E. M. Runyard. The Master heard the oral arguments on the objections that were filed before him. The Waukegan Lumber & Coal Company then asked and obtained leave to introduce additional testimony, which was heard.

It is insisted by the plaintiff in error that the Waukegan Lumber & Coal Company was not entitled to a lien prior to the others, for the reason that the evidence does not sustain their contention that their contract for the furnishing of the building materials, etc., was entered into on October 29, 1928. Without a discussion of the evidence on this point, we think the evidence fully sustains the claim of the Waukegan Lumber & Coal Company., that said contract was entered into on October 29, 1928.

It is next insisted that the master in chancery erred in permitting the Waukegan Lumber & Coal Company to introduce evidence after he had made his findings, and as claimed by the plaintiff in error, to impeach the testimony that had been introduced by the Waukegan Lumber & Coal Co., at the former hearing. Whether a Master in Chancery shall reopen a case and hear further proof rests largely on his own discretion. The case was referred to the Master to obtain all the proof that has any bearing upon the rights of the parties. If any party had failed to put in evidence that substantiated their claims, it was in the discretion of the Master to permit the party to introduce such evidence, so that when the Master makes his report to the court, the court will have before it all the evidence that pertained to the rights of the

had; that there is no explanation of the necessity of recalling the witness. The Master took the proof and hears the testimony of the different witnesses which is reported to the court. It is now contended by the plaintiff in error that the report was never perfected. Without the [illegible] filed by the defendant and intervening petitioners, Wabagon Lumber & Coal Company, Ben Goodman, doing business as Goodman Electric, Young v. Wright, [illegible] v. [illegible]. The Master heard the oral arguments on the objections that were filed before him. The Wabagon Lumber & Coal Company then asked and obtained leave to introduce additional evidence, which was heard.

It is insisted by the plaintiff in error that the Wabagon Lumber & Coal Company was not entitled to a lien prior to the claims. The [illegible] that the evidence [illegible] [illegible] discussion of the evidence on this point, we think the evidence fully sustains the claim of the [illegible] Coal Company, that said company was entitled [illegible].

It is next insisted that [illegible] permitting the Wabagon Lumber & Coal Company to introduce evidence after it had made its [illegible], and to [illegible] to impeach the testimony that had been introduced by the Wabagon Lumber & Coal Co., at the former hearing. Whether a master in Chancery shall reopen a case and hear further proof rests largely on his own discretion. The case was referred to the Master to obtain all the proof that has any bearing upon the rights of the parties. If any party had failed to put in evidence that substantiated their claims, it was in the discretion of the Master to permit the party to introduce such evidence, so that when the Master makes his report to the court, the court will have before it all the evidence that pertains to the rights of the

respective parties. In this case we do not think that the Master abused this discretion. - Dooley v. Ahern, 191 Ill. App. 140.

The Plaintiff in error next insists that the waiver signed by the Waukegan Lumber & Coal Co., is a waiver of their entire claim, and that they are now barred from maintaining that they have a mechanics' lien on the premises. In construing the language used by the parties it is essential to investigate what the intentions of the parties were in using the language in the written waiver. In the case of Burgoyne v. Pyle, 261 Ill. App. 356, the Court had before it an instrument in which it was claimed that the plaintiffs waived their mechanic's lien, and in their opinion say: "It has been held that in cases of ambiguity the doubt should be resolved against the waiver, since it should be presumed, in the absence of clear evidence to the contrary, that one has not disabled himself from the use of so valuable a privilege as that given by statute for the enforcement of builder' rights in the circumstances involved." (Concrete Apt. House Co., v. O'Brien, 128 Ill. App. 437; Davis v. LaCrosse Hospital Ass'n., 121 Wis. 579) In the former case the court said: "If the parties had so intended they would have made it evidence in their contract. To be effective there must be an express covenant or a covenant resulting from the language used, so plain that a mechanic could so understand without seeking a professional interpretation as to its legal effect."

From an examination of the waiver in question it is our opinion that it is not a complete waiver, but only to the amount of $1000.00, and for the balance of the claim of the Waukegan Lumber & Coal Company it has a first prior lien upon the premises in question.

There seems to be no dispute that Max Goodman, doing business as the Goodman Electric, furnished material to the amount of $56.25, and in our opinion his lien should be second. It is not disputed but what the plaintiff in error has a lien on the property in

question for the amount it claims. The only question is one of priority. In our opinion the plaintiffs in error claim should be third and subject to the prior lien of the Waukegan Lumber & Coal Co., and Max Goodman, doing business as the Goodman Electric. Eugene Runyard's note and trust deed had stamped on their face that they were a junior mortgage, and it is our opinion that Eugene Runyard has a lien on said premises for the amount of his claim, which in its order should be fourth and subject to the lien of the Waukegan Lumber and Coal Company, and to Max Goodman, doing business as the Goodman Electric Co., and the plaintiff in error, the State Bank and Trust Company. The judgment of the Circuit Court insofar as finding the Waukegan Lumber & Coal Company entitled to a first lien and that Max Goodman, doing business as the Goodman Electric Co., has a second lien on said premises is hereby affirmed.

The decree of said court in finding that the plaintiff in error is subordinate to the lien of Eugene Runyard is hereby reversed and the case remanded to the Circuit Court of Lake County with direction to enter a decree in accordance with the findings as set forth in this opinion.

Affirmed in part, and reversed and remanded with directions.

[illegible] for [illegible] it claims. The only question is one of priority. In our opinion the plaintiffs in error clear should be held and subject to the prior lien of the [illegible] Company's note and trust deed had attached on their [illegible] property [illegible] and it is our opinion that Eugene Hungerford has a lien on said premises for the amount of his claim, which in its order should be fourth and subject to the lien of the [illegible] Company, but is not [illegible] being business as the Goodman Mineral Co., and the plaintiff in error, the State Bank and Trust Company. The judgment of the circuit court therefore as finding the Hungerford Lumber & Coal Company entitled to a first lien and that Max Goodman, doing business as the Goodman Mineral Co., has a second lien on said premises is hereby affirmed.

The decree of said court in finding that the plaintiff in error is subrogated to the lien of Eugene Hungerford [illegible] [illegible] and [illegible] is [illegible] [illegible] with [illegible] in such a manner as [illegible] the [illegible] as set forth in this opinion.

Affirmed in part, and reversed and remanded with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31) 7

8556

8/17

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 25 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8556. Ag. No. 22.

IN THE

APPELLATE COURT OF ILLINOIS.

SECOND DISTRICT.

October Term, A. D., 1932.

SWORDS BROS. COMPANY,
a Corporation,
Complainant and Appellee,
vs.
SECURITY FIRST MORTGAGE CO.
Defendant and Appellant,

Appeal from the
Circuit Court,
Winnebago County.

WOLFE - * * P. J.

The Swords Brothers Company, a corporation, filed its bill in the circuit court of Winnebago County to enforce a mechanic's lien against the property of the Capital Theater Building Corporation. The Swords Brothers Company was a dealer and general contractor in all kinds of heating, plumbing, electrical, sheet metal and kindred supplies. The Capital Theater Building Corporation was the owner of certain land in question whereon a theater building, comprising a theater, stores and apartments, was being erected, for which the appellee furnished certain labor and material, and now claims a lien on the premises for the same.

The Capital Theater Building Corporation started to erect the building upon the premises and when the same was partially completed they applied to the Security First Mortgage & Trust Co., for a loan of $125,000.00. A loan was finally negotiated for $80,000.00, and to secure the same a trust deed was executed in favor of the Security First Mortgage Company for the sum of $80,000.00 on December 1, 1927. The notes were in small denominations and were disposed of to numerous holders.

In the original bill the Security First Mortgage & Trust Company was made a party defendant to the same. They filed a general and special demurrer to the bill which was sustained by the court. The bill was amended and a general and special demurrer to the same was refiled and the court again sustained the demurrer. The complainant asked leave to amend their bill, but before doing so, entered a motion that the order sustaining the demurrer to the bill be set aside, which the court overruled. The motion came on for hearing and the court sustained the motion and set aside the former order sustaining the demurrer and, overruled the same. The Security First Mortgage Company announced that they would abide their demurrer, but later abandoned the same and asked leave of court and was granted the right to file an answer, which they did. They now claim that the bill is insufficient and does not state a cause of action according to the mechanic's Lien Law.

It is the contention of the appellant that before the loan was placed on the property that the Security First Mortgage Company procured from all the contractors and subcontractors waivers of mechanics liens and it was agreed upon by Truman Johnson, president of the Security First Mortgage Company, and Thomas E. Swords, president of the Swords Bros. Company, that from the proceeds of the $90,000.00, the Swords Bros. Company was to receive $10,000.00, or approximately 50 per cent of the amount of its bill for labor and materials which they had furnished for the construction of the building. That for the balance of the amount due from the Capital Theater Building Corporation the Swords Bros. Co., would be guaranteed by the Capital Theater Building Corporation by notes personally guaranteed by the owners of the Capital Theater Building Corporation.

The first question presented to this court is: Does the amended bill of complaint state a good cause of action under the Mechanic's Lien Law; or, is it so defective that by reason of the averment of the

In the original bill the Security First Mortgage & Trust Company was made a party defendant to the case. They filed a general and special demurrer to the bill which was sustained by the court. The bill was amended and a general and special demurrer to the same was sustained and the court again sustained the demurrer. The complainant asked leave to amend their bill, but before doing so, entered a motion that the order sustaining the demurrer to the bill be set aside, which the court overruled. The motion came on for hearing and the court sustained the motion and set aside the former order sustaining the demurrer and, overruled the same. The Security First Mortgage Company announced that they would abide their demurrer, but later abandoned the same and asked leave of court and was granted the right to file an answer, which they did. They now claim that the bill is insufficient and does not state a cause of action according to the mechanic's lien law.

It is the contention of the appellant that before the lien was placed on the property that the Security First Mortgage Company procured from all the contractors and subcontractors waivers of mechanic's liens and it was agreed upon by Thomas Johnson, president of the Security First Mortgage Company, and Frank L. Snider, president of the Smyrna Inn, Company, that just the proceeds of the $[illegible], the Smyrna Inn, Company was to receive $10,[illegible], to satisfactorily CO use some of the amount of its bill for labor and materials which they had furnished for the construction of the building. That for the balance of the money the Inn Realty Theater Building Corporation, the Smyrna Inn, Co., would be guaranteed by the Realty Theater Building Corporation to make permanently unencumbered by the owners of the Realty Theater Building Corporation.

The first question presented to this court is: Does the amended bill of complaint state a good cause of action under the mechanic's lien law; or, is it as contended that by reason of the waivers of the

bill that the appellee has not brought itself within the terms and provisions of that law? The appellants, by abandoning their demurrer, are now seeking to raise the question of the sufficiency of this bill by their answer. An examination of the bill discloses defects that could have been easily cured by an amendment to the bill; but weare of the opinion that the bill itself states a good cause of action under the Mechanic's Lien Law.

The appellants insist that there is not sufficient proof in the record to sustain the findings of the master and decree of the court to establish a claim for a mechanic's lien of the Swords Bros. Company; and that there is variance between the proof offered and the allegations of the bill. A discussion of these claims would serve no useful purpose at this time. After an exmaination of the record we are of the opinion that there is sufficient proof in the record to sustain the claim of the Swords Bros. Company, and that the proof is not variant from the allegations of the bill.

Appellants seriously insist that Swords Bros. Company, through its president, waived its right to a mechanic's lien at the time they loaned the $90,000.00 to the Capital Theater Building Corporation. Our statutes provide that in order there may be a good and sufficient waiver of lien between the parties there must be a special agreement between them, and this is so even when the contractor or sub-contractors takes co-lateral security for its loan. In this case it is not contended that there is a written waiver, the appellants relying solely upon the conversation alleged to have tak en place between Mr. Johnson for their company and Mr. Swords for theswords Bros. Company. At the time of the hearing before the master Mr. Thomas E. Swords, the former president of the Swords Bros. Co., had died. The president and secretary of the appellant were produced as witnesses and testified to the conversation in connection with the waiver of the lien.

In the case of Burgoyne vs. Pyle, 261 Ill., App. the court in

bill that the appellee has not brought itself within the terms and
regulations of this law. The appellants, by abandoning their contention,
have now seeking to raise the question of the sufficiency of this bill
by their answer. An examination of the bill discloses defects that
should have been easily cured by an amendment to the bill; but none
of the grounds upon the bill itself shows a good cause of action
under the Kansas's lien law.

The appellants denied that there is not a sufficient cause
for equity to exist in favor of the appellee and have
moved to establish a claim for a mechanic's lien of the Kansas type.
Frankly, and that there is variance between the proof offered and
the allegations of the bill. A discussion of these claims would serve
no useful purpose at this time. After an examination of the record
we are of the opinion that there is sufficient proof in the record
to sustain the claim of an Kansas lien. Nothing, but the proof
is now related from the allegations of the bill.

Appellants earnestly insist that Kansas Code, Section, Laws
of the president, waived the right to a mechanic's lien at the time they
opened the [illegible] or the Capital Theater Building Corporation.
The evidence reveals that it was their duty to a good and sufficient
bond if it was desired the plaintiff would be a public corporation
between them, and this is so even when the contractor or sub-contractor
filing no-interest security for its loan. In this case it is not
contended that there is a written waiver, the appellants relying solely
upon an oral waiver allegedly by [illegible] between Mr. Johnson
the trial judge and Mr. Smith the president [illegible]. Johnson, at the
time of the meeting before the [illegible] Theater [illegible]
president of the Smith [illegible], [illegible]. The president [illegible]
secretary of the corporation [illegible] and [illegible]
to the contractor in connection with the [illegible] of the film.

In the case of Gutzwiler vs. Fyle, 3 Ill. App. the court in

discussing what constitutes a waiver of a mechanic's lien say: "It has been held in cases of ambiguity the doubt should be resolved against the waiver, since it should be presumed, in the absence of clear evidence to the contrary, that one has not disabled himself from the use of so valuable a privilege as that given by statute for the enforcement of builder's rights in the circumstances involved. (Concord Apt. House Co. v. O'Brien, 128 Ill., App. 437; Davis v. La Crosse Hospital Ass'n, 121 Wis, 579.) In the former case the court said: "If the parties had so intended, they would have made it evident by their contract. To be effective, there must be an express covenant or a covenant resulting by implication from the language used, so plain that a mechanic could so understand without seeking a professional interpretation as to its legal effect."

It appears to us that the most favorable construction that can be placed upon the testimony of the president and secretary of the appellant company is that there was a request made by the appellant for a waiver of the lien and the appellee stated it would not be necessary for a waiver of the lien, because it had made other arrangements with the owner. It is our opinion that this language is not that clear and decisive language that is necessary to be used to show a waiver of a mechanic's lien.

We find no reversible error in the record and the decree is accordingly affirmed.

Affirmed.

Interesting that constitutes a waiver of a mechanic's lien may: "It has been held in cases of mechanics' the phrase should be construed against the waiver, since it should be presumed, in the absence of clear evidence to the contrary, that one not intended himself from the use of so valuable a privilege as this given by statute for the protection of builder's rights in the circumstances involved. (Revised Lot. Cases 34, v. Fisher, 122 Ill., Ann. 447; Hyde v. La Tempe Mechanic Aerie, 123 Ill, 479.) In the former case the court said: "If the parties had so intended, they would have made it applicable by plain language. To be effective, there must be an express waiver or a necessary modification by implication from the language used, or that from a contract should be reasonably adopted a professional interpretation on to the legal effect."

It appears to me that the most favorable construction that can be placed upon the decision of the Supreme Court relative to the mechanic's lien in that there was a certain work or the equivalent the a waiver of the lien and the principle stated in would not be necessary for a waiver of the lien. Because it had made other arrangements with the owner. It is not quite that this language is not very clear and decisive language that is necessary to be used to show a waiver of a mechanic's lien.

In that so reasonable error in the manner but the theory is absolutely illiteral.

Illiteral.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(65027—1M—9-31) 7

8567

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

269 I.A. 658

BE IT REMEMBERED, that afterwards, to-wit: On FEB 28 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

8567.

Ag. No. 40

IN THE

APPELLATE COURT OF ILLINOIS.

Second District.

October Term, A. D. 1932.

WEBER-FURMAN HARDWARE CO.,
Complainant and Appellee,
vs.
FRANK M. GAMBINO, et al.,
Defendant and Appellant.

Appeal from the Circuit Court of Winnebago County, Illinois.

WOLFE * * P. J.

The record discloses that the Weber-Furman Hardware Co., the original complainant in the case filed its bill to foreclose a mechanics lien on certain designated property in the City of Rockford, Winnebago County, Illinois. In the same suit various other mechanic lien claimants filed their answers and intervening petitions seeking to foreclose mechanic's lien on the same property. Among the parties filing an answer and intervening petitions to the original bill was the appellee, the Skandia Coal & Lumber Co., and in its answer and intervening petition filed April 26, 1930, it sought to establish and enforce by foreclosure and sale a mechanic's lien on the same real estate.

The Skandia Coal & Lumber Co., entered into an oral contract with one Frank Gambino to furnish all the necessary building materials for the construction of the building to be erected upon said premises. Pursuant to that agreement, the Skandia Coal & Lumber Company began delivering building materials to the said premises on May 20, 1929, and continued to deliver materials thereto until January 2, 1930, which was the date of the last

delivery of the materials to the premises under and by virtue of the contract between the Skandia Coal & Lumber Co., and the said Frank M. Gambino. The contract was an oral one and at the time of making the same the said Frank M. Gambino was the real owner of the said described real estate. On June 21, 1929, the record title to said real estate was transferred to Marie R. Gambino, who is the sister-in-law of Frank M. Gambino, the said Marie R. Gambino holding legal title for the sole use and benefit of the said Frank M. Gambino. This title was held by the said Marie R. Gambino as a convenience to Frank M. Gambino, due to the fact that at the time various judgments were on record against the said Frank Gambino.

The record further discloses that Frank M. Gambino continued to be the real owner of the property until September 6, 1929, when at his direction Marie R. Gambino and Anthony B. Gambino, her husband, conveyed the real estate in question by warranty deed to one Giovannia Picchi and Joe Picchi; that on April 8, 1928, and prior to the time that said Frank M. Gambino contracted for said materials with the said Skandia Coal & Lumber Co., the said Frank Gambino entered into a construction contract with Giovannia Paris Picchi. By the terms of said contract the said Frank M. Gambino agreed to erect on the said described premises a bungalo for $7,400, according to the plans and specifications contained in the contract. This original contract was by a later agreement between the parties amended, changing the style of the house from a frame bungalo to a brick veneer, and adding a two car brick veneered garage. On September 7, 1929, the day following the conveyance of Marie R. Gambino and Anthony B. Gambino of the real estate according to the direction of Frank M. Gambino to Mr. and Mrs. Picchi, the said Giovannia Picchi and Joe Picchi executed to the Rockford Life Ins. Co., a certain mortgage on said premises as security for a loan of $4000.00, evidenced by notes maturing on or before five years after

delivery of the materials to the premises under and by virtue of the contract between the Ebenezer Coal & Lumber Co., and the said Frank K. Gambino. The contract was an oral one and at the time of making the same the said Frank K. Gambino was the real owner of the said described real estate. On June 24, 1929, the record title to said real estate was transferred to Marie R. Gambino, mother of the said Frank Gambino, who is the sister-in-law of Frank K. Gambino, the said Marie R. Gambino holding legal title for the sole use and benefit of the said Frank K. Gambino. This title was held by the said Marie R. Gambino as a convenience to Frank K. Gambino, due to the fact that at the time various judgments were of record against the said Frank Gambino.

The record further discloses that Frank K. Gambino continued to be the real owner of the property until September 4, 1929, when at his direction Marie R. Gambino and Anthony V. Gambino, her husband, conveyed the real estate in question by warranty deed to the Ebenezer Plumb and Ice Plant, that on April 8, 1929, and prior to the time that said Frank K. Gambino contracted for said materials with the said Ebenezer Coal & Lumber Co., the said Frank Gambino entered into a construction contract with Ebenezer Paris Plumb. By the terms of said contract the said Frank K. Gambino agreed to erect on the said described premises a dwelling for $4,200, according to the plans and specifications appearing in the contract. The original contract was in a later agreement between the parties modified, changing the style of the house from a frame bungalo to a brick veneer, and adding a two car brick veneered garage. On September 7, 1929, the day following the conveyance of Marie R. Gambino and Anthony R. Gambino of the real estate mentioned in the Ebenezer Plumb Ice Plant, the said Frank K. Gambino to Ebenezer Plumb, the said Ebenezer Plumb and the Plant executed to the Ebenezer Lumber Co., a mortgage on said premises as security for a loan of $4000.00, evidenced by notes maturing on or before five years after

date thereof. The notes and mortgages were signed by Mr. and Mrs. Picchi, and said mortgage was duly acknowledged and recorded in Winnebago County. The proceeds of this loan was paid to Mr. and Mrs. Picchi by check executed to the Rockford Life Ins. Co., which was endorsed by Mr. and Mrs. Picchi to Frank M. Gambino. Frank Gambino thereupon used $650.00 of that sum to pay off an existing mortgage on the property and to pay a few small claims of mechanic's liens on the premises and deposited the balance of the money in the bank. This money was later attached by other of Gambino's creditors. At the time the said notes and mortgage were executed and the money paid consummating the agreement entered into between the Rockford Life Insurance Co., and said Picchi, all the transactions were handled on behalf of the Rockford Life Insurance Co., by the bookkeeper. The Rockford Life Insurance Co., did not demand from Frank M. Gambino any sworn statement as to the amount of the bills for materials used in the construction of the house on said premises, nor was any waiver of the mechanic's lien demanded by them. On a hearing of the case a decree was entered in favor of the Skandia Coal & Lumber Co., and the Rockford Life Insurance Co., the appellant, brings the case to this court on appeal.

The point relied upon for reversal is: It is the claim of the appellant that Giovannia Picchi and Joe Picchi, her husband, were the owners; that Frank M. Gambino was the contractor; that the appellee Skandia Coal & Lumber Company, was a sub-contractor; that the Rockford Life Insurance Co. the appellant, was an encumbrancer under the laws of the State of Illinois, and that they sustained this relation to each other from the inception of the transaction, viz: the date of the contract, April 18, 1929; that the appellee subcontractor, did not maintain its lien pursuant to and under the terms of the mechanic's lien act of the State of Illinois.

date thereof. The notes and mortgages were signed by Mr. and Mrs. Plisch, and paid mortgages were duly acknowledged and recorded in Allegheny County. The proceeds of this loan were paid to Mr. and Mrs. Plisch by cashier's check in the Peoples Savings Bank, which was endorsed by Mr. and Mrs. Plisch to Frank H. Gamble. Frank Gamble therefore on June 5, 1930 at that date to pay off an existing mortgage on his property and to pay a few small claims of mechanic's liens on the premises and deposited the balance of the money in the bank. This money was later attached by other of Gamble's creditors. At the time the said notes and mortgage were executed and the money paid commencing the agreement entered into between the Peoples Life Insurance Co., and said Plisch, all the transactions were handled on behalf of the Peoples Life Insurance Co., by the bookkeeper. The Peoples Life Insurance Co., did not deal from Frank H. Gamble nor were statements as to the amount of the bills for materials used in the construction of the house on said premises, nor the name of the mechanic's lien demanded by them. On a hearing of the case a decree was entered in favor of the Mechanic and Lumber Co., and the Peoples Life Insurance Co., the appellant, brings the case to this court on appeal.

The point relied upon for reversal is: It is the claim of the appellant that Giovanna Plisch and Joe Plisch, her husband, were the owners that Frank H. Gamble was the contractor; that the appellee Mechanic Co. & Lumber Company, was a subcontractor; that the Peoples Life Insurance Co. was wrongful, in the circumstances, under the laws of the State of Illinois, and that the wrongful acts relating to such other was the inception of the transaction, at the date of the contract, April 22, 1927; that the appellee subcontractor, did not maintain its lien against the owner in the manner of the mechanic's lien act of the State of Illinois.

It is not questioned but what the appellees furnished the materials and that the same were used in the construction of the building. The only question for this court to decide is whether under the mechanic's lien law of Illinois, the appellee is an original contractor or a sub-contractor! An examination of the notice which was served upon the owner of the property would lead one to believe that the appellees were sub-contractors, but the right of the parties should be determined not by what the parties may term themselves, but on the allegations of the bill for mechanic's lien and the proof supporting the same.

In the case of the City of Salem vs. Lane and Bodley, 189 Ill., 593. it was contended that notice for lien was given on the theory that the claimant was a sub-contractor and the court, in passing upon the question, say: "Section 1, of the Act under which the lein accrued declares in express terms that a person who contracts with the owner of land to furnish material, machinery, etc., to be used in erecting buildings on the land or improving the same, shall be known as a contractor. In the notice placed before the City council by the defendant in error company relative to the demand for the engine, the defendant in error was styled "sub-contractor," and such designation is followed in the bill. The true designation of the defendant in error depends upon the facts bearing upon the contractual relation of the City and Reed & Co. These facts were included in the statement, and were, moreover, well known to the council, and it could not have been misled. The allegations of the bill fully disclose the facts the entire transaction much in detail, and that the defendant in error company was a "contractor" within the meaning of said Section 1, is thus demonstrated. It is not essential that the bill for a mechanic's lien shall, in express terms, denominate the complainant therein to be either a contractor, or a subcontractor, and if the material circumstances of time, place, acts and other facts necessary to establish the capacity in which

arises the right to the relief, are plainly alleged. The class of lienors to which a complainant belonged is not to be determined from the conclusion of the pleader, but from the facts alleged on which such conclusion rests. When the necessary facts are stated, the legal consequences which arise out of the facts need not be stated; nor does the allegation by one party and the denial by the other, of a mere legal conclusion, raise an issue. A pleader is not concluded by the averment of a legal inference, if such inference is repugnant to the true legal conclusion to be drawn from the state of facts alleged in the same pleadings."

From an examination of the answer and intervening petition of the appellee we are of the opinion that it properly states a cause of action for a mechanic's lien for the original contractor and that the evidence fully sustains the allegations of the bill; and that the court properly found that the claim of the appellee for a mechanic's lien was superior to that of the appellant and the judgment of the Circuit Court of Winnebago County is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31) 7

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57

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 3 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8576. Ag. No. 43.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1932.

ETHEL McCLARY, Administratrix
of the Estate of Amel W. McClary,
Deceased,
Appellee,

vs.

GRAND LODGE BROTHERHOOD OF
RAILROAD TRAINMEN,
Appellant.

Appeal from the
Circuit Court of
Kankakee County.

WOLFE * P. J.

The appellee is the administratrix of the Estate of Amel McClary. Said McClary died after he brought this action against the appellant, but before it came to trial. At the close of all of the evidence in the case, the trial court instructed the jury to find a verdict in favor of the appellee, and a judgment for $2800.00 was rendered against the appellant. The action is founded on a contract of insurance, or beneficiary certificate issued by the appellant to McClary on June 17, 1919. McClary was a railroad switchman and a member of the Kankakee Lodge, No. 700, a subordinate lodge of the Grand Lodge Brotherhood of Railway Trainmen, the appellant.

On march 25, 1919, McClary signed an application for a beneficiary certificate to be issued to him by the appellant. The application was furnished by the appellant and it is designated as 'Form 131'; a part of the application isheaded 'Form B. Applicant's Certificate." The applicant's certificate contains answers

No. 8887.

IN THE

APPELLATE COURT OF ILLINOIS

Sixth District

October Term, A. D. 1930.

THOMAS BUCKLAND, Administrator
of the Estate of Lewis T. Mudlavy,
Deceased,

Appellee,

Appeal from the
Circuit Court of
Lawrence County.

Vs.

MIGNON LUMBER COMPANY OF
ILLINOIS CORPORATION,

Appellant.

MODIFY & R. A. F.

The appellee is the administrator of the Estate of Lewis Mudlavy. Said Mudlavy died after he became injured in the workshop, but before it came to trial. At the close of all of the evidence in the case, the trial court instructed the jury to find a verdict in favor of the appellee, and a judgment for $3000.00 was rendered against the appellant. The action is founded on a contract of insurance, or beneficiary certificate issued by the appellant to Mudlavy on June 17, 1928. Mudlavy was a married bachelor and a member of the Knights Lodge, W. W., a subordinate lodge of the Grand Lodge Knights of Mutuality (Illinois). (A Corporation).

On March 5, 1929, Mudlavy filed an application for a benefit Fraternity certificate to be issued to him by the appellant. The application was transmitted by the appellant and it is contended as there (?) a part of the application intended from T. Buckland's Beneficiary.* The application's certificate contains express

in the handwriting of the examining physician who recorded the answers of McClary in response to the questions in Form B. One of the questions and the answer thereto, is: "Have you ever been afflicted with any of the following complaints or diseases? Insanity, inflamation, or any other disorder of the spine? A. No." The application also contains instructions to the examining physician governing his physical examination of the applicant. The findings of the examination are recorded in Form B., and in Form C., which are also a part of the application. The examining physician recorded in the application that McClary was normal, and that he didd not have any disease or disorder which affected his health. In the applicant's certificate it is stated that the applicant adopts the answers made in Forms B, and C, as his own, and "admit to be material, warrant to be true, full and complete and make the basis of the contract with said Brotherhood, and in the event any untrue or incomplete statements or answers have been made this contract shall be null and void and of no effect."

Thereupon a beneficiary certificate was issued to McClary by the appellant entitling him to all the rights, privileges and benefits of membership in the Brotherhood and to participate also in the beneficiary department thereof to the total amount of $2800.00, which should be paid to him in the event ofhis total and permanent disability, as defined in section 68 of the Constitution of the Brotherhood.

The certificate states that it is issued upon the express condition that McClary comply with the Constitution, general rules and regulations of the Brotherhood, which, as printed and published by the Brotherhood, together with the application for the certificate, the medical examination and the certificate constitute the contract between McClary and the Brotherhood, When the certificate was delivered to McClary it had copies of the application and medical examination attached to it, and the secretary and treasurer of

is the handwriting of the examining physician who recorded the answers of Mallory in response to the questions in Form 3. One of the questions and the answer thereto, is: "Have you ever been afflicted with any of the following complaints or diseases? Insanity, deformities, or any other disorder of the mental i. ?." The applicants for policies undertakings by the associations providing the insured benefits of the policies. The findings of the examiners are recorded in form 3., and in form 7., which are also a part of the application. The insurance contracts recorded in the association that Mallory was insured, and that he had not been any disease or disorder which afflicted his health. In the affidavit particularly it is stated that the applicant which the answers made by Form 3. and 7. is true, and "that it is material, warrant to be true, full and complete and made the basis of the contract with said Brotherhood, and in the event any untrue or incomplete statements or answers have been made this contract shall be null and void and of no effect."

Thereupon a beneficiary certificate was issued to Mallory by the association providing the payment of the sum, privileges and benefits of membership in the Brotherhood and its auxiliaries also in the beneficiary department thereof in the total amount of $[illegible], which should be paid to his in the event death and permanent disability, as defined in section 81 of the Constitution of the Brotherhood.

The certificate states that it is issued subject to certain conditions to a further amount with the Constitution, General Laws and regulations of the Brotherhood, which, is attached and delivered in the Constitution, together with the application for the certificate, the medical examination and the certificate constitute the contract between Mallory and the Brotherhood. When the certificate was delivered to Mallory it had on its face of the application and medical examination attached to it, and the constitution and laws of

Lodge No. 700, certified on the certificate that McClary accepted the certificate upon the condition set forth.

Section 68 of the Constitution of the Brotherhood provides, so far as its provisions are material to this case, that any beneficiary in goodstanding who shall suffer the complete and permanent loss of sight of one or both eyes shall be considered totally and permanently disabled, and shall thereby be entitled to receive, upon furnishing sufficient and satisfactory proof of such total and permanent disability, the full amount of his beneficiary certificate.

Section 69 of said constitution provides that proof of total and permanent disability shall be made by the insured and the secretary of the Lodge of which the insured is a member, by promptly making statements in writing of such disability on the form prescribed by the Brotherhood, andunder seal of the Lodge, which statements shall be signed by the president and treasurer of such subordinate lodge; that the attending physician shall make a sworn statement setting forth the nature and extent of the injury; that these proofs, including the beneficiary certificate and all receipts for all dues and assessments paid by the member, are to be forwarded to the secretary and treasurer of the Grand Lodge of the Brotherhood for allowance or rejection of the claim.

Owing to the efforts of McClary to collect the $2800.00 under the beneficiary certificate before he brought his action, as will hereinafter appear, it should be stated that the constitution of the Brotherhood contains a provision permitting the presentation of claims not coming within the terms of section 68 of the said constitution. Such claims are designated "benevolent claims" and they are provided for in sections 70 and 71 of the constitution. Section 70 provides that such claims shall be addressed to the benevolence of the Brotherhood and shall in no case be made the basis of any legal liability on the part of the Brotherhood. All

Lodge No. 700, certified on the certificate that Modjary accepted the certificate under the conditions set forth.

Section 35 of the Constitution of the Brotherhood provides, so far as its provisions are material to this case, that any incapacity in contracting who shall notify the secretary and treasurer of the Brotherhood in writing of such disability on the form prescribed by the Brotherhood, signed and of the Lodge, which statement shall be signed by the president and treasurer of such subordinate lodge; that the attending physician shall make a sworn statement setting forth the nature and extent of the injury; that these proofs, including the beneficiary certificate and all receipts for all dues and assessments paid by the member, are to be forwarded to the secretary and treasurer of the Grand Lodge of the Brotherhood for allowance or rejection of the claim.

Owing to the efforts of Modjary to collect the $500.00 under the beneficiary certificate before he demonstrated the existence of the disability, it should be evident that the constitution of the Brotherhood contains a provision requiring the presentation of claims and proofs within the time of payment of the said compensation. Such claims are designated "accident claims" and they are provided for in sections 34 and 41 of the constitution. Section 41 provides that such claims shall be indicated on the beneficiary of the Brotherhood and shall in no case be made the basis of any legal liability on the part of the Brotherhood. All

benevolent claims disapproved by the Beneficiary Board are to be reported tothe Board of Insurance at the next annual meeting of the Brotherhood for such disposition as the Board of Insurance shall deem just and proper. Section 71 provides that a member desiring to present a claim under section 70 shall petition his lodge in writing upon the form provided by the general secretary and treasurer, which petition is to be executed by the member and a regular physician showing the condition of the member and the basis of his claim.

On August 27, 1930, McClary petitioned his lodge for the allowance of a benevolent claim and the petition was approved by his lodge. The petition contains the certificate of Dr. D. J. O'Loughlin stating that on August 20, 1930, he examined McClary and found "an optic atrophy, complete, right eye."

McClary in the month of September, 1930, filled out the blanks required by the Brotherhood as proofs for application for a benevolent claim as required by sections 70 and 71 of the constitution. Dr. O'Loughlin, claimant's attending physician, stated in the proof for McClary's benevolent claim, "regarding visual efficiency this man has a total loss of right eye and condition is permanent." It appears from the report of Dr. O'Loughlin and the declaration of McClary for benevolent claim, both of which are parts of said proofs, that McClary's disability began on June 23, 1923, and that he performed no train or yard service after that date.

Notices dated December 4, 1930, were sent to the treasurer of Lodge No. 700 and to McClary containing the information that his disability claim had been disapproved by the Beneficiary Board. In his notice McClary was further informed that the said action of the Beneficiary Board would be reported to the Board of Insurance at the next annual mmeting of the Grand Brotherhood and that if he desired might appear before said latter board the last week in

benevolent claims disapproved by the Beneficiary Board are to be reported to the Board of Insurance at the next annual meeting of the Brotherhood for such disposition as the Board of Insurance shall deem just and proper. Section 71 provides that a member desiring to present a claim under section 70 shall petition his lodge in writing upon the form provided by the general secretary and treasurer, such petition is to be executed by the member and a regular physician showing the condition of the member and the basis of his claim.

On August 27, 1930, McGlary petitioned his lodge for the allowance of a benevolent claim and the petition was approved by his lodge. The petition contains the certificate of Dr. E. O'Loughlin stating that on August 20, 1930, he examined McGlary and found "an optic atrophy, complete, right eye."

McGlary in the month of September, 1930, filled out the blanks required by the Brotherhood as proofs for application for a benevolent claim as required by sections 70 and 71 of the constitution. Dr. O'Loughlin, claimant's attending physician, stated in the proof for McGlary's benevolent claim, "regarding visual efficiency this man has a total loss of right eye and condition is permanent." It appears from the report of Dr. O'Loughlin and the declaration of McGlary for benevolent claim, both of which are parts of said report, that McGlary's disability began on June 20, 1928, and that he performed no train or yard service after that date.

Papers dated December 4, 1930, were sent to the treasurer of Lodge No. 700 and to McGlary containing the information that his disability claim had been disapproved by the Beneficiary Board. In his notice McGlary was further informed that the said action of the Beneficiary Board would be reported to the Board of Insurance at the next annual meeting of the Grand Brotherhood and that if he desired other papers should be filed in order that the last year in

January. The reason given in the notice of rejection of the benevolent claim was that in the judgment of the beneficiary Board the claimant was not totally and permanently disabled according to the laws of the Brotherhood. At the annual meeting of the Grand Brotherhood held in January, 1931, the action of the Beneficiary Board Disapproving the claim of McClary was sustained by the Board of Insurance. It appears from theevidence that McClary appeared before the Board of Insurance at the annual meeting of the Grand Brotherhood held in January, 1931. Under date of March 9, 1931, the secretary of lodge 700 was informed of the action of the Board of Insurance, taken on the claim.

During the month of December, 1930, after McClary had received the notice of the Beneficiary Board of the rejection of his claim by said Board, he told R. K. Robertson, the secretary of Lodge 700, that he thought he, McClary had better make a claim against the Brotherhood on account of his back; that his army discharge would show about his back.

The first part of May, 1931, McClary consulted C. J. Cary, an attorney, about the rejection of his benevolent claim and Cary wrote to the Brotherhood seeking for information about the claim. On May 7, 1931, Cary again wrote a letter to the Brotherhood stating that he did not understand why McClary's claim had been disallowed; that to satisfy himself as to the facts he had had McClary examined by several physicians and the letter states, "have before us their finding to the effect that, 'this claimant is wholly and permanently disabled, suffering from a malady he may not outlive; that he is not able to perform manual labor, nor able to earn a livelihood, suffering from an injury: Further, we have had him under observation and our advice is that he goes about stooped, crippled, is sick and bodily unable to work.'" In this letter Cary also expressed the opinion that McClary's

January. The reason given in the notice of rejection of the benevolent claim was that in the judgment of the beneficiary board the claimant was not totally and permanently disabled according to the laws of the Brotherhood. At the annual meeting of the Grand Brotherhood held in January, 1921, the action of the beneficiary board disapproving the claim of Mallory was sustained by the Board of Investment. It appears from the beneficiary Mallory presented before the Board of Insurance at the annual meeting of the Grand Brotherhood held in January, 1921. Under date of March 9, 1921, the secretary of Lodge 700 was informed of the action of the Board of Insurance, taken on the claim.

During the month of December, 1921, after Mallory had received the notice of the beneficiary Board of rejection of his claim by said Board, he told R. V. Robertson, the secretary of Lodge 700, that he thought he, Mallory, had better make a claim against the Brotherhood on account of his injury; that his case discovery would now <u>clear</u> his hurt.

The third week of May, 1921, Mallory consulted L. L. Fry, in Attorney, about the rejection of his benevolent claim and Fry wrote to the Brotherhood seeking for information about the claim. On May 7, 1921, Fry quite wrote a letter to the Brotherhood stating that the rejection was indicated was indicated that he had been disabled; that he already showed as a fact that he had had injury resulting by reason of injuries and the latter claim. Fry wrote letters on June 7, 1921 to the effect that, "This claimant is worth not permanently disabled, suffering from a bulge in his back, but this is not a rupture, this is not a rupture, nothing normal later, was able to work a limited, returning from an injury. Further, he have had his main observation and our advice is that he was about stopped, refused, is sick and totally unable to work."

In this letter Fry also expressed the opinion that Mallory's

claim is meritorious and asks the Brotherhood to reconsider its decision of March 9, 1931, which, as above shown, was the final rejection of the claim by the Board of Insurance.

So far as can be ascertained from the letters introduced in evidence, the general counsel of the Brotherhood replied to Cary's letter of May 7, 1931, by letter dated June 29, 1931. This letter was not seen by Cary until about August 1, 1931, owing to his absence from his office. On August 1, 1931, Cary answered the letter of June 29, 1931, and stated that it gave him a better conception of the contract under which McClary was insured. The letter of Cary also stated that McClary had been recently examined by several physicians and their reports showed that he was suffering from arthritis of thespine; that the arthritis was permanent and progressive and McClary totally disabled. The letter also stated that two doctors reported that McClary was without sight in the right eye and the vision badly impaired in his left eye; that the reports on McClary's physical condition bring him wholly within sections 69 and 70 of the contract and the report on his eye-sight brought him wholly within section 68 of the contract, and, therefore, lifts his case from the consideration of the benevolent side of the contract and he is, therefore, entitled to the payment of his insurance at once,and in all events without any consideration of the benevolent side whatsoever.

This letter of Cary's dated August 1, 1931, contained this paragraph: "You desire some army information concerning this man and I have had him supply me with the discharge papers showing that he was in the army three days and discharged way back in June, 1918, as then having arthritis of the spine and was then considered as unfit for army service, with the disease a progressive one you can understand something of the condition of this man thirteen years thereafter. It will be necessary that you return me this army

claim in mentioning and take the Brotherhood to reconsider its decision of March 9, 1921, which, as above shown, was the final rejection of the claim by the Board of Insurance.

So far as can be ascertained from the letters introduced in evidence, the general counsel of the Brotherhood replied to Gary's letter of Jan 7, 1921, by letter dated June 27, 1921. This letter was not seen by Gary until about August 1, 1921, owing to his absence from his office. On August 1, 1921, Gary answered the letter of June 29, 1921, and stated that it gave him a better conception of the contract under which McGlary was insured. The letter of Gary also stated that McGlary had been recently examined by several physicians and their reports showed that he was suffering from arthritis of theapine; that the arthritis was permanent and progressive and McGlary totally disabled. The letter also stated that two doctors reported that McGlary was without sight in the right eye and the vision badly impaired in his left eye; that the reports on McGlary's physical condition bring him wholly within sections 88 and 90 of the contract and the report on his eye-sight brought him wholly within section 88 of the contract, and, therefore, lifts his case from the consideration of the benevolent side of the contract and he is, therefore, entitled to the payment of his insurance at once, and in all events without any consideration of the benevolent side whatsoever.

This letter of Gary's dated August 1, 1921, concluded with the request: "You desire some army information concerning this man and I have had his supply me with the discharge papers showing that he was in the army three days and discharged for duty in June, 1919, as then having arthritis of the spine and was then considered as unfit for army service, with the disease a progressive one you can understand something of the condition of this man thirteen years thereafter. It will be necessary that you return me this army

certificate when it shall have served its purpose to you."

Under date of August 4, 1931, the general counsel of the Brotherhood replied to Cary's letter of August 1, and stated that certain additional proofs in re claim of McClary had been received and that the matter had been referred to the Beneficiary Board; that he was retaining a photostatic copy of thearmy discharge.

Under date of August 14, 1931, R. R. K. Robertson, secretary of Lodge 700 received a letter from the Grand Brotherhood which is as follows: "This is to advise you that the Beneficiary Board found it necessary to disapprove the benevolent claim of Brother Amel W. McClary of your lodge, cancel his beneficiary certificate and order the return of his beneficiary and tuberculosis assessments remitted on his account from the date of his admission as Class D member, May 1919 to August 1931, on account of misstatements in Form 131 relative to his vision. This section is in accordance with sections 59 and 140 of the Constitution, the former reading as follows: 'If any untrue or incomplete answers shall be made in said application, then the certificate issued thereunder and said contract shall be absolutely null and void.' I am enclosing herewith check No. C23130 in the sum of $483.80 payable to Amel W. McClary which kindly deliver to him after he has signed the enclosed receipt in the presence of a witness, returning the voucher to the undersigned. You should not accept any further beneficiary assessments on behalf of Brother McClary. If he desires he may remain in the organization as an honorary member."

Cary replied to the letter dated August 14, 1931, and stated that he had been shown that letter to Robertson and in which it was stated that the Brotherhood had disallowed McClary's claim on the ground that he had made misstatements concerning his vision and that he instructed McClary not to accept the voucher for

certificate when it shall have served its purpose to you."

Under date of August 4, 1951, the general counsel of the Brotherhood replied to Gary's letter of August 1, and stated that certain additional proofs in re claim of McGlary had been received and that the matter had been referred to the Beneficiary Board; that he was retaining a photostatic copy of thearmy discharge.

Under date of August 14, 1951, S. J. Robertson, secretary of Lodge 700 received a letter from the Grand Brotherhood which is as follows: "This is to advise you that the Beneficiary Board found it necessary to disapprove the benevolent claim of Brother Ancel W. McGlary of your Lodge, cancel his beneficiary certificate and order the return of his beneficiary and subsequents assessments remitted on his account from the date of his admission as Class D member, May 1910 to August 1951, on account of misstatements in Form 131 relative to his vision. This action is in accordance with sections 59 and 140 of the Constitution, the former reading as follows: 'If any untrue or incomplete answers shall be made in said application, then the certificate issued thereunder and said contract shall be absolutely null and void.' I am enclosing herewith check No. 0381150 in the sum of $488.80 payable to Ancel W. McGlary which kindly deliver to him after he has signed the enclosed receipt in the presence of a witness, returning the voucher to the undersigned. You should not accept any further beneficiary assessments on behalf of Brother McGlary. If he desires he may remain in the organization as an honorary member."

Gary replied to the letter dated August 14, 1951, and stated that he had been given that letter to Robertson and in which it was stated that the Brotherhood had disallowed McGlary's claim on the ground that he had made misstatements concerning his vision and that he instructed McGlary not to cancel the insurance in

$483.80. On August 21, 1931, the secretary and treasurer of the Brotherhood wrote to Cary stating that the information furnished Robertson was erroneous, "because we stated that the membership of this man was cancelled on account of misstatements on his Form 131 application for Beneficiary Certificate relative to his vision, and it should have read that his membership was cancelled relative to his having arthritis prior to making application for Beneficiary Certificate, ofwhich he made no mention. We believe we have conclusive evidence that he was afflicted with arthritis of the spine prior to that time."

On September 25, 1931, McClary filed his declaration in the case before us. As amended, the declaration alleges that on, to-wit, August 31, 1931, McClary suffered permanent disability in that he lost the sight of both eyes, "and thereupon he notified the defendant of his said total disability and made satisfactory proof thereof to the defendant." During the trial the First Count of the declaration was amended by adding to the allegation just quoted the following, "and the defendant waived formal proof of permanent disability under the terms of said Benefit Certificate and rejected McClary's claim for total and permanent disability on ground other than that said claim was not made according to Benefit Certificate and waived formal proof of claim."

The Second or additional count, alleges that McClary kept and performed all conditions precedent by him to be performed.

The appellant contends that the trial court erred by refusing its peremptory instruction offered at the close of all of theevidence in the case because the averment in the declaration of waiver of proofs of disability is a conclusion of the pleader, and therefore, ineffective. There was no demurrer made to the declaration. It is not contended that the declaration is not sufficient to support the judgment. The allegation of waiver was inserted at the close

$482.08. On August 21, 1921, the secretary and treasurer of the membership wrote a letter stating that the [illegible] Fraternal Robertson was erroneous, "because we stated that the membership of this man was cancelled on account of misstatements on his form 187 application for Beneficiary Certificate relative to his vision, and it should have read that his membership was cancelled relative to his having arthritis prior to making application for Beneficiary Certificate, which he made no mention. We believe we have conclusive evidence that he was afflicted with arthritis of the spine prior to that time."

On September 28, 1921, McQuary filed his declaration in the case before us. As amended, the declaration alleges that [illegible] Lodge #1, 1921, McQuary suffered permanent disability in that he lost the sight of both eyes, "and thereupon he notified the defendant of his said total disability and made satisfactory proof thereof to the defendant." During the trial the Fifth Count of his declaration was amended to allege he is the Christopher Lee named in "Exhibit", and for information which [illegible] permanent disability under the terms of said Benefit Certificate and requested McQuary's claim for total and permanent disability on ground other than that said claim was not made according to Benefit Certificate and related Fraternal proof of claim."

The lapsed on additional count, Exhibit and defendant [illegible] performed all conditions demanded by him to be performed.

The evidence showed that the trial court based its ruling upon the necessary instruction offered on the issue of all of Defendant's in the case therein the evidence in the [illegible] of entry of proofs of disability is a conclusion of the pleader, and therefore, inoperative. There was no demurrer made to the declaration. It is also contended that the declaration is not sufficient to support the judgment. The allegation of waiver was inserted at the close

of appellee's evidence, and the appellant proceeded with the trial and introduced evidence on the merits of the case. The objection that the allegation of waiver is a legal conclusion cannot be sustained after verdict. Supreme Lodge K. of P., v. McLeman, 171 Ill., 417; Plankinton v. Gray 63, Fed. 415; Penrose v. Winter, 135 Cal., 289, 67 Pac. 772; Arizona Eastern R. Co., v. Globe Hardware Co. 14 Ariz. 397, 129 Pac, 1104; Louisville, etc. R. Co. v. Lawes, 21 Ky 1793, 56 S. W. 26.

There is also some criticism made by the appellant of the first count of the declaration because it alleges that McClary made satisfactory proofs of his disability and also alleges waiver of proofs of disability, on the ground that the allegations are inconsistent or repugnant. We think the objection cannot be urged after verdict. -- Wilson etc., Fertilizer Co., v. Automobile Ins. Co., 283 Fed., 501; Stephenson v. Bankers Life Assoc., 108 Ia. 637, 79 N. W. 459; German Ins. Co., v. Shader, 68 Neb. 1, 93 N W 972.

It is also assigned as error that the trial court erred in giving the peremptory instruction offered by the appellee at the close of all of the evidence. It is urged by the appellant that the evidence is conclusive that McClary's answer in his application for the beneficiary certificate that he had never had inflamation of disease of the spine is untrue; that the answer is a warranty, stated to be true and admitted in the application to be material to the risk. That therefore, a verdict for the appellant would have been proper; at least, the appellant argues the question whether McClary had arthritis of the spine at the time of the execution of the application for the beneficiary certificate, under the evidence, should have been submitted to the jury as a question of fact.

The proposition of the appellant that if McClary was in fact afflicted with arthritis of the spine at the time he signed the

of appellee's evidence, and the appellant proceeded with the trial and introduced evidence on the merits of the case. The objection that the allegation of waiver is a legal conclusion cannot be sustained after verdict. Suwanee Lodge K. of P., v. Holeman, 171 Ill., 427; Blankinship v. Gray 85, Ind. 415; Pennsylvania v. Fisher, 119 Ind., 324, 27 Am. 667; Lightner Sanitary Co., v. Minor Manufacturing Co. 76 Ind. 287, 128 Pac. 1104; Louisville, etc. R. Co. v. Lucas, 21 Ky 1127, 84 S. W. 32.

There is also some criticism made by the appellant of the first count of the declaration because it alleges that McCluy made satisfactory proofs of his disability and also alleges waiver of proofs of disability, on the ground that the allegations are inconsistent or redundant. In this the objection cannot be upheld either verified. -- Wilson Adm., Fraternity M., v. Schmelzle Ins. Co., 102 Ind., 501; Vandeman v. Modern Life Assoc., 109 Ia. 227, 79 N. W. 489; Dupont Ins. Co., v. Fowler, 60 Mich. 3, 30 N W 677.

It is also assigned as error that the trial court erred in giving the plaintiffs instruction offered by the appellee at the close of all of the evidence. It is urged by the appellant that the evidence is conclusive that McCluy's answer to his application for the benefiliary certificate was in not answer but indicating of illness of his wife is untrue; that the answer is a warranty, stated to be true and material to the application to be relied on the risk. That therefore, a verdict for the appellee would have been proper; in fact, the appellant argues the question whether McCluy had arthritis of the spine at the time of the examination of the application for the beneficiary certificate, under the evidence, should have been submitted to the jury as a question of fact.

The proposition of the appellant that if McCluy was in fact afflicted with arthritis of the spine at the time he signed the

application then the certificate was void and appellant had a right to cancel it, although McClary's answer was innocently made, is sustained by the case of Hancock V. Knights of Security, 303 Ill., 66. The evidence shows that the doctor who examined McClary when he made application of the certificate was the medical examiner of the appellant; that McClary was required to strip for the examination and the doctor gave him a detailed physical examination. This doctor testified that he went over McClary's spine with palpitation, that is manipulation with the fingers; that arthritis of the spine would not necessarily be discovered by such examination; that arthritis of the spine is an inflamatory process of the articular processes between the vertebrae; that the disease is detected in the beginning stages only by means of an X-ray photograph or it might be revealed in an microscopic examination; that he discovered no tenderness nor evidence of spinal trouble as a result of the examination. The doctor testified that arthritis of the spine, "might be of years and years duration and a thing that might appear to be the result of an arthritis, might be any one of a dozen other things." McClary was employed as a railroad switchman for about four years after he signed the application for the certificate. His army discharge is dated June 27, 1918, and states that McClary was inducted into the service on June 24, 1918, and discharged, "by reason of physical disability arthritis of spine."

Dr. Roth called as a witness by the appellee, testified that McClary was blind in the right eye on July [illegible], 1931, and the condition permanent. Dr. O'Loughlin, appellant's witness, testified that he examined McClary about August 19, 1930, for the purpose of executing the physician's certificate attached to McClary's petition to lodge No. 700, for the benevolent claim, and that at that time McClary could see objects with his right eye at a distance from him of five feet; that he could see a hand at five feet and count the

qualification than the certificate was void and appellant had a right to cancel it, although McGlary's cancel was innocently made, is sustained by the case of Hancock V. Minutes of Security, 305 Ill., 88. The evidence shows that the doctor who examined McGlary when he made application of the certificate was the medical examiner of the appellant; that McGlary was required to strip for the examination and the doctor gave him a detailed physical examination. This doctor testified that he went over McGlary's spine with palpitation, that is manipulation with the fingers; that rigidity of the spine would not necessarily be discovered by such examination; that rigidity of the spine is an inflammatory process of the articulation process between the vertebrae; that the disease is detected in the beginning stages only by years of an X-ray photograph or it might be revealed in an microscopic examination; that he discovered no tenderness nor evidence of spinal rigidity as a result of the examination. The doctor testified that rigidity of the spine, "since he of years and years duration and a thing that would seem to be the result of an accident, might be one of a dozen other things." McGlary was employed as a railroad switchman for about five years after he signed the application for the certificate. His employment in dated June 27, 1922, and states that McGlary was inducted into the service on June 24, 1918, and discharged, "by reason of physical disability rigidity of spine."

Mr. Roth called as a witness by the appellee, testified that McGlary was blind in the right eye on July 27, 1921, and the condition persisted. Dr. O'Donghlin, appellant's witness, testified that he examined McGlary about August 19, 1920, for the purpose of executing the operation's certificate attached to McGlary's petition to Judge Sc. 750, for the numerous cities, and that at that time McGlary could see objects with his right eye at a distance from him of five feet; that he could see a hand at five feet and count the

fingers thereon; that his left eye was normal. His testimony apparently contradicted his physician's certificate just referred to. However, Dr. O'Loughlin explained that he stated in the physician's certificate that McClary was totally blind in his right eye on the basis that McClary's eyesight was so defective as to cause a total disability preventing him from following his trade as a railroad switchman. The physician's certificate was introduced in evidence by the appellee in the first instance and not introduced for the purpose of impeaching Dr. O'Loughlin's testimony on behalf of the appellant.

From the foregoing summary of the facts appearing in evidence we have come to the conclusion that the question whether McClary made a false answer in his application for the beneficiary certificate in his reply to the question if he was afflicted with inflamation or disease of the spine; and the question whether he was blind in his right eye as alleged in the declaration, were questions of fact which should have been submitted to the jury under the pleadings in the case. - Nyman v. Man. & Mer. Life Ass'n., 262 Ill., 300; Metropolitan Life Ins. Co., vs Moravec 214 Ill., 186.

It is also contended by the appellant that the correspondence between the Brotherhood and Cary was inadmissible on theground of a variance between the allegations of the declaration and the proofs. We do not think that the application and the proofs made by McClary for a benevolent claim have any relevancy on the question of the waiver of proofs required by the constitution of the Brotherhood for the filing and prosecution ofa claim under section 68 of the constitution. However, it seems clear that the letter of Cary dated August 1, 1931, directed to the Brotherhood and in which he enclosed the army discharge of McClary, and in which he also stated that the condition of his eyesight brought him within section 68, was properly admitted; including the letter dated August 14, 1931,

lid over the eyeball; but his left eye was normal. His testimony
correctly contradicted the physician's certificate upon material
ty. However, Dr. O'Loughlin explained that he stared in the oph-
thalmic's certificate that Mallory was totally blind in his right
eye on the basis that Mallory's eyesight was so defective as to
cause a total disability preventing him from following his trade
as a railroad worker. The physician's testimony was inter-
duced in evidence by the appellee in the first instance and not
introduced for the purpose of impeaching Dr. O'Loughlin's testi-
mony on behalf of the appellant.

From the foregoing summary of the facts appearing in evidence
we have come to the conclusion that the question whether Mallory
made a false answer in his application for the beneficiary
certificate in his reply to the question if he was afflicted with
inflammation or disease of the spine; and the question whether he
was blind in his right eye as alleged in the declaration, were
questions of fact which should have been submitted to the jury under
the pleadings in the case. - Hyman v. Hom. & Ber. Life Ass'n.,
262 Ill., 300; Metropolitan Life Ins. Co., vs Moravec 214 Ill., 166.

It is also contended by the appellant that the correspondence
between the Brotherhood and Gary was inadmissible on the ground of a
variance between the allegations of the declaration and the proofs.
We do not think that the application and the proofs made by Mallory
for a benevolent claim have any relevancy on the question of the
nature of proofs required by the constitution of the Brotherhood
for the filing and prosecution of a claim under section 83 of the con-
stitution. However, it seems clear that the letter of Gary dated
August 1, 1921, directed to the Brotherhood and in which he
enclosed the ever determinate of Mallory, and in which he also stated
that the condition of his operation because the right sensing ex-
ceedingly doubtful; inasmuch the letter dated August 1, 1921,

which cancelled McClary's beneficiary certificate, the reply thereto, and the letter of August 21, 1931, giving the real reason of the Brotherhood for the cancellation of the certificate. Supreme Lodge K. P., v. Connelly 185 Ala. 301, 64 So. 362; Union Fraternal League v. Sweeney, 184 Ind. 378, 111 N. E. 305; Fischer v. Supreme Lodge K & L. H., 190 Mo. A, 606, 176 S.W. 269.

The appellee attempts to assign cross-errors in his printed argument and brief filed in this court. There are no cross errors written upon or attached to the record and signed by counsel, as required by rule 12 of this court. Therefore, appellee's argument that the court erred in not awarding her interest and also erred in admitting McClary's army discharge has not been considered.

It is our opinion that the trial court erred in directing a verdict for theplaintiff, and the judgment of said court of Kankakee Co. is hereby reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(65027—1M—9-31) 7

8375

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 25 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

8375 Ag. No. 7.

IN THE

APPELLATE COURT OF ILLINOIS.

SECOND DISTRICT.

October Term A. D., 1931.

PEOPLE OF THE STATE OF ILLINOIS
Defendant in Error,

vs.

PERCY B. SULLIVAN,
Plaintiff in Error.

Appeal from the Circuit Court of Livingston County, Illinois.

WOLFE: * * P. J.

The grand-jury of the Circuit Court of Livingston County returned an indictment against Percy B. Sullivan, Plaintiff in error, which is as follows:

"The grand jurors, chosen, selected, and sworn, in and for the County of Livingston in the name and by the authority of the People of the State of Illinois, upon their oaths present that Percy B. Sullivan, late of the County of Livingston and State of Illinois, on to-wit: the Twenty-first day of November, in the year of our Lord One Thousand Nine Hundred and Twenty-nine, at and in the said County of Livingston and State of Illinois aforesaid, knowingly, fraudulently, designedly, wilfully, unlawfully and falsely did pretend to Albert Rients and Minnie Rients that he, the said Percy B. Sullivan, had been sent to the said Albert Rients and Minnie Rients by their banker, and he, the said Percy B. Sullivan, desired to install an electric carbide plant in the house of the said Albert Rients and Minnie Rients free of charge for demonstrating purposes; that he the said Percy B. Sullivan was not selling anything, and he further falsely pretended to have a paper which would entitle said Albert Rients and

Minnie Rients to certain commissions in the event prospects came and looked at said demonstrating electric carbide plant after it was installed, and said Percy B. Sullivan further falsely represented and stated to the said Albert Rients and Minnie Rients that in order to obtain said commissions, it was necessary for the said Albert Rients and Minnie Rients to sign a paper which he then had, which false pretenses and statements were made by the said Percy B. Sullivan with the design and for the purpose to induce said Albert Rients and Minnie Rients to then and there place, attach, sign and affix their signatures to said paper, and at the time the said Percy B. Sullivan so as aforesaid, made said pretenses, he well knew said pretenses to be false, and said Albert Rients and Minnie Rients relying on said false pretenses, and believing them to be true, and being deceived thereby were induced by reason thereof after the making of said false pretenses and false statements, to place, attach, sign, and affix their signatures to said paper which said paper, as the said Percy B. Sullivan well knew, was a promissory note, being in the following words, letters and figures to-wit: "$342.50 Flanagan, Ill., Nov. 21, 1929. Six Months after date, for value received, I promise to pay Standard Light Co., at the Farmers State Bank, Flanagan, Illinois, Three hundred & forty two & 50/100 Dollars with interest from date at the rate of 6 per cent per annum, payable semi-annually, and if not paid at maturity, then and thereafter to pay interest at the rate of seven per cent per annum, payable semi-annually.

The makers and endorsers hereof severally waive presentment for payment, protest, notice of protest and notice of non-payment of this note and further severally authorize and direct the holder hereof at any time to apply any money received or standing for their joint or several credit toward the payment of this note, whether due by its terms, or not. Each maker of this note is a principal, and together

Minnie Ricketts to certain commissions in the event occurrence came and looked at said demonstrating electric carbide plant after it was installed, and said Percy B. Sullivan further falsely represented and stated to the said Albert Ricketts and Minnie Ricketts that in order to obtain said commissions, it was necessary for the said Albert Ricketts and Minnie Ricketts to sign a paper which he then had, which false references and statements were made by the said Percy B. Sullivan with the design and for the purpose to induce said Albert Ricketts and Minnie Ricketts to them and have them, either, sign and affix their signatures to said paper, and at inducing the said Percy B. Sullivan so as aforesaid, made said pretenses, he well knew said pretenses to be false, and said Albert Ricketts and Minnie Ricketts relying on said false pretenses, and believing them to be true, and being deceived thereby were induced by reason thereof unless the making of said false pretenses and false references, to sign, attest, sign, and affix their signatures to said paper which said Percy B. Sullivan then had, was a worthless note, [illegible] in the following words, Interest Not Payable Until Maturity. Kansas, Ill., Nov. 21, 1908. Six months after date, for value received, I promise to pay Minnie Ricketts or, at the Farmers State Bank, Kansas, Illinois, Three hundred & forty two & 50/100 Dollars with interest from date at the rate of 8 per cent per annum, payable semi-annually, and if any payment certain, then and thereafter it may bear at the rate of ten per cent per annum, payable semi-annually.

The makers and endorsers hereof severally waive presentment for payment, protest, notice of protest and notice of non-payment of this note and further severally authorize and direct the holder hereof at any time to apply any money received or standing for their joint or several credit toward the payment of this note, whether due by its terms or not. Each maker of this note is a principal, and together

with the endorser thereof, severally agrees that no extension of the time of payment with or without my knowledge by receipt of interest or otherwise, shall release me from the obligation of payment.

If this note is placed in the hands of any attorney at law for collection, either in theordinary course of collection, or by virtue of the power herein conferred, I agree to pay an attorney's fee of twenty-five dollars and ten per cent, addition on the excess of principal and interest over and above $200.00. And in consideration of the above indebtedness as a further security therefor, I hereby irrevocably make any attorney-at-law my attorney for me and in my name to appear in any court of record, in term time or in vacation, at any time on or after the date hereof, to waive service of process and confess a judgment on this note in favor of the payee, his assigns or thelegal holder, for such sum as then shall appear to be unpaid, including an attorney's fee of twenty-five dollars and ten per cent, additional on the excess of principal and interest over and above $200.00, and costs; to agree that no writ or error or appeal shall be prosecuted on such judgment, nor any bill in equity to interfere therewith; to release all error in entering such judgment or issuing execution thereon, and to consent to immediate execution on such judgment."

P. O. Flanagan, Ill. Albert Rients"
No. 3 Minnie Rients"
Due 23141 1930."

By which said false pretenses the said Percy B. Sullivan did then and there knowingly, wilfully, unlawfully, maliciously and fraudulently obtain the signatures of the said Albert Rients and Minnie Rients to said promissory note, which said signatures so obtained as aforesaid, was in the words following, to-wit: Albert Rients and Minnie Rients, and that after the obtaining of said signatures of said Albert Rients andMinnie Rients said Percy B. Sullivan did obtain from the said Albert Rients and Minnie Rients said

with the endorser thereof, severally agrees that no extension of the time of payment with or without or modification by release of indorser or endorser, shall release or lessen the liability of indorser.

If this note is placed in the hands of any attorney at law for collection, either in bankruptcy courts or collection, or by virtue of the power herein conferred, I agree to pay an attorney's fee of twenty-five dollars and ten per cent, addition on the excess of principal and interest over and above $100.00. For in consideration of the place indebtedness as a further security thereof, I hereby irrevocably make my attorney-at-law my attorney for me and in my name to appear in any court of record, at term time or in vacation, at any time on or after the date hereof, to waive service of process and confess a judgment on this note in favor of the payee, his assigns or trustees or holder, for such sum as that shall appear to be unpaid, including an attorney's fee of twenty-five dollars and ten per cent, additional on the excess of principal and interest over and above $100.00, and hereby to agree that no suit or other proceeding shall be prosecuted on such judgment, nor any bill in equity to interfere therewith; to release all error in entering such judgment or issuing execution thereon, and to consent to immediate execution on such judgment.

J. E. Thomson, Jr.
No. 1
Due Jan 1st.

Be which said Jules presented the said Henry I. Mullins and then and there herewith, without, unauthorized, unauthorized obtain the signatures of the said Albert Hinds and Minnie Hinds to said promissory note, which said signatures so obtained as aforesaid, was in the words following, to-wit: Albert Hinds and Minnie Hinds, and that after the obtaining of said signatures of said Albert Hinds and Minnie Hinds, said Henry I. Mullins then and there with the said Albert Hinds and Minnie Hinds

written instrument being the said promissory note, and said Albert Rients and Minnie Rients did then and there deliver said promissory note to the said Percy B. Sullivan with the signatures of the said Albert Rients andMinnie Rients thereto attached as aforesaid; that the said false pretenses were made by the said Percy B. Sullivan to Albert Rients and Minnie Rients with the design and purpose of cheating and defrauding them, the said Albert Rients and Minnie Rients, and that said Percy B. Sullivan did then and there obtain the signatures of said Albert Rients and Minnie Rients, and did then and there obtain said instrument to-wit: said promissory note with the design and for the purpose of then and there cheating and defrauding said Albert Rients and Minnie Rients, whereas in truth and in fact as said Percy B. Sullivan well knew, said Percy B. Sullivan had not been sent to said Albert Rients and Minnie Rients by their banker; that he, the said Percy B. Sullivan, did not desire to install an electric carbide demonstrating plant in the house of the said Albert Rients and Minnie Rients free of charge for demonstrating purposes; that said paper, which said Percy B. Sullivan requested the said Albert Rients and Minnie Rients to sign, did not entitle said Albert Rients and Minnie Rients to commissions in the event prospects came and looked at said electric carbide demonstrating plant, all of which representations the said Percy B. Sullivan well knew at the time he so falsely pretended as aforesaid, were untrue and fraudulent, and well knew the same to be false, and did thereby cheat and defraud the said Albert Rients and Minnie Rients, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

And the grand Jurors aforesaid, chosen, selected and sworn in and for the County of Livingston aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, upon

written instrument being the said promissory note, and said Albert Nionte and Minnie Nionte did then and there deliver said promissory note to the said Percy B. Sullivan with the signatures of the said Albert Nionte and Minnie Nionte thereto attached as aforesaid; that the said false pretenses were made by the said Percy B. Sullivan to Albert Nionte and Minnie Nionte with the design and purpose of cheating and defrauding them, the said Albert Nionte and Minnie Nionte, and that said Percy B. Sullivan did then and there obtain the signatures of said Albert Nionte and Minnie Nionte, and did then and there obtain said instrument to-wit, said promissory note with the design and for the purpose of then and there cheating and defrauding said Albert Nionte and Minnie Nionte, whereas in truth and in fact as said Percy B. Sullivan well knew, said Percy B. Sullivan had not been sent to said Albert Nionte and Minnie Nionte by their banker; that he, the said Percy B. Sullivan, did not desire to install an electric carbide generating plant in the house of the said Albert Nionte and Minnie Nionte free of charge for demonstrating purposes; that said paper, which said Percy B. Sullivan presented the said Albert Nionte and Minnie Nionte to sign, did not entitle said Albert Nionte and Minnie Nionte to participate in the event a company came and looked at said electric carbide generating plant, all of which representations the said Percy B. Sullivan well knew at the time he so falsely presented as aforesaid, were untrue and fraudulent, and well knew the same to be false, and did thereby cheat and defraud the said Albert Nionte and Minnie Nionte, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same Commonwealth of the State of Illinois.

And the grand jurors aforesaid, upon, and sworn in and for the county of Livingston aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, upon

their oaths aforesaid, do further present that Percy B. Sullivan, late of the County of Livingston and the State of Illinois, on, to-wit, the twenty-first day of November in the year of our Lord, one thousand nine hundred twenty-nine, at and in the said County of Livingston and State of Illinois aforesaid, knowingly, fraudulently, designedly, wilfully, unlawfully and feloniously, and with intent to defraud Albert Rients and Minnie Rients, did represent and pretend to them, the said Albert Rients and Minnie Rients, that he, the said Percy B. Sullivan, desired to install an electric carbide plant in the home of the said Albert Rients and Minnie Rients, free of charge and for demonstrating purposes, and that the said Albert Rients and Minnie Rients were to receive a certain commission for every prospective purchaser who came to examine and look at said electric carbide plant as aforesaid, and that a certain instrument, in writing, which he, the said Percy B. Sullivan, had prepared and ready to be executed by them, the said Albert Rients and Minnie Rients, was a slip of paper upon which the said Albert Rients and Minnie Rients would be credited with commissions in the event that prospective purchasers came and looked at said demonstrating electric carbide plant as aforesaid; that slip of paper was to be placed in the bank so that the said Albert Rients and Minnie Rients might receive credit for their commissions thereon, it being then and there understood by and between the said Percy B. Sullivan and the said Albert Rients and Minnie Rients as aforesaid that he, the said Percy B. Sullivan, would install said electric carbide plant in their home as aforesaid, free of charge and for demonstrating purposes, and that the said Albert Rients and Minnie Rients were to receive a certain sum for prospective purchasers who came to look at and investigate said electric carbide plant as aforesaid. By means ofwhich false representation and pretenses as aforesaid, and the said Albert Rients and Minnie Rients believing them to be true, the said Percy B. Sullivan did then and there obtain

their cable aforesaid, do further present that Percy B. Sullivan, late of the County of Livingston and the State of Illinois, on, to-wit, the twenty-first day of November in the year of our Lord, one thousand nine hundred twenty-nine, at and in the said County of Livingston and State of Illinois aforesaid, knowingly, feloniously, deliberately, wilfully, unlawfully and feloniously, and with intent to defraud Albert Ribotte and Minnie Ribotte, did represent and pretend to them, the said Albert Ribotte and Minnie Ribotte, that he, the said Percy B. Sullivan, desired to install an electric cuckie plant in the house of the said Albert Ribotte and Minnie Ribotte, free of charge and for demonstrating purposes, and that the said Albert Ribotte and Minnie Ribotte were to receive a certain commission for every prospective purchaser who came to examine and look at said electric cuckie plant as aforesaid, and that a certain instrument, in writing, which he, the said Percy B. Sullivan, had presented and read to be executed by them, the said Albert Ribotte and Minnie Ribotte, was a slip of paper upon which the said Albert Ribotte and Minnie Ribotte would be credited with commissions in the event that prospective purchasers came and looked at said demonstrating electric cuckie plant as aforesaid; that slip of paper was to be placed in the box so that the said Albert Ribotte and Minnie Ribotte might receive credit for their commissions therefor, it being then and there understood by and between the said Percy B. Sullivan and the said Albert Ribotte and Minnie Ribotte as aforesaid that he, the said Percy B. Sullivan, would install said electric cuckie plant in their home on approval, free of charge and for demonstrating purposes, and that the said Albert Ribotte and Minnie Ribotte were to receive a certain commission-money-bearing who came to look at the aforesaid electric cuckie plant as aforesaid. By means of which false representations and pretenses aforesaid, had the said Albert Ribotte and Minnie Ribotte believing the same to be true, the said Percy B. Sullivan did then and there obtain

the names and signatures of them, and the said Albert Rients and Minnie Rients, to a certain written instrument in the form of a promissory note of them, the said Albert Rients and Minnie Rients purporting to bear date of November twenty-first in the year of our Lord one thousand nine hundred and twenty-nine for the sum of three hundred forty-two dollars and fifty cents ($342.50) payable to the Standard Light Company, at the Farmers State Bank, Flanagan, Illinois, six months after date, for value received, with interest from date at the rate of six per cent per annum, payable semi-annually, and if not paid at maturity then and thereafter to pay interest at the rate of seven per cent per annum, payable semi-annually; whereas in truth and in fact, the said instrument in form of a promissory note as aforesaid, so prepared and made ready by the said Percy B. Sullivan for the signatures of them, the said Albert Rients and Minnie Rients as aforesaid, was not a slip of paper upon which their commissions would be endorsed as aforesaid or so that the said Albert Rients and Minnie Rients would obtain credit thereon in the manner as aforesaid nor was the same placed in any bank, and said instrument was not a slip of paper which it was then and there understood by and between the said Percy B. Sullivan and the said Albert Rients and Minnie Rients should be executed; all of which the said Percy B. Sullivan then and there well knew, and with the intention of the said Percy B. Sullivan then and there to wrong and defraud the said Albert Rients and Minnie Rients, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the same People of the State of Illinois.

And the Grand Jurors aforesaid, chosen, selected and sworn in and for the County of Livingston aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, upon their oaths aforesaid, do further present that Percy B. Sullivan, late of the County of Livingston and State of Illinois on the twenty-first

the names and signatures of them, and the said Albert Ritchie and Minnie Ritchie, to a certain written instrument in the form of a promissory note of them, the said Albert Ritchie and Minnie Ritchie purporting to bear date of 10 member twenty-first in the year of our Lord one thousand nine hundred and twenty-nine for the sum of three hundred forty-two dollars and fifty cents ($342.50) payable to the Standard Joint Company, at the Farmers State Bank, Pinckney, Illinois, six months after date, for value received, with interest from date at the rate of six per cent per annum, payable semi-annually; and if not paid at maturity then and thereafter to bear interest at the rate of seven per cent per annum, payable semi-annually; whereas in truth and in fact, the said instrument in form of a promissory note aforesaid, so produced and made ready by the said Henry E. Sullivan for the signatures of them, the said Albert Ritchie and Minnie Ritchie as aforesaid, was not a slip of paper upon which their signatures would be endorsed as aforesaid or so that the said Albert Ritchie and Minnie Ritchie would obtain credit thereon in the manner as aforesaid nor was the same placed in any bank, and satisfactory was not a slip of paper which it was then and there understood by and between the said Henry E. Sullivan and the said Albert Ritchie and Minnie Ritchie should be examined; all of which the said Henry E. Sullivan then and there well knew, and with the intention of the said Henry E. Sullivan then and there to wrong and defraud the said Albert Ritchie and Minnie Ritchie, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the same People of the State of Illinois.

And the Grand Jurors aforesaid, chosen, selected and sworn in and for the County of Livingston aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, upon their oaths aforesaid, do further present that Henry E. Sullivan, late of the County of Livingston and State of Illinois on the twenty-first

day of November in the year of our Lord, one thousand nine hundred and twenty-nine, at and in the said County of Livingston and State of Illinois as aforesaid, knowingly, fraudulently, designedly, wilfully, unlawfully, and feloniously, and with intent to defraud Albert Rients and Minnie Rients did represent and pretend to them, the said Albert Rients and Minnie Rients, that a certain instrument in writing which he, thesaid Percy B. Sullivan, then and there had prepared and ready to be executed by Albert Rients and Minnie Rients, was a slip of paper by which the said Albert Rients and Minnie Rients would obtain a certain sum of money as commissions, and said commissions as aforesaid were to be credited upon said slip of paper, and the said slip of paper as aforesaid, was to be kept in a bank for that purpose, it being then and there understood by and between the said Percy B. Sullivan and the said Albert Rients and Minnie Rients, that he, the said Percy B. Sullivan, would install an electric carbide plant in the home of the said Albert Rients and Minnie Rients, free of charge, for demonstrating purposes, that the said Albert Rients and Minnie Rients were to receive a certain sum of money as commissions for every prospective purchaser who came to examine and look at the said electric carbide plant as aforesaid. By means of which false representations and pretenses as aforesaid, the said Albert Rients and Minnie Rients believing them to be true, he, the said Percy B. Sullivan, did then and there obtain the names and signatures of the said Albert Rients and Minnie Rients to a certain written instrument in the words and figures to-wit:

$342.50 Flanagan, Ill. Nov. 21, 1929.

Six months after date, for value received, I promise to pay Standard Light Co., at the Farmers State bank, Flanagan, Illinois, Three Hundred Forty-two and 50/100 Dollars with interest from date at the rate of 6 per cent per annum, payable semi-annually, and if not paid at maturity, then and thereafter to pay interest at the rate of seven per cent per annum, payable semi-annually.

day of November in the year of our Lord, one thousand nine hundred and twenty-nine, at and in the said County of Livingston and State of Illinois as aforesaid, knowingly, fraudulently, deceitfully, falsely, unlawfully, and feloniously, and with intent to defraud Albert Ricketts and Minnie Ricketts did represent and pretend to them, the said Albert Ricketts and Minnie Ricketts, that a certain instrument in writing which he, the said Percy E. Sullivan, then and there had prepared and ready to be executed by Albert Ricketts and Minnie Ricketts, was a slip of paper by which the said Albert Ricketts and Minnie Ricketts would obtain a certain sum of money as commissions, and said commissions as aforesaid were to be credited upon said slip of paper, and the said slip of paper as aforesaid, was to be kept in a bank for that purpose, it being then and there understood by and between the said Percy E. Sullivan and the said Albert Ricketts and Minnie Ricketts, that he, the said Percy E. Sullivan, would install an electric cordide plant in the home of the said Albert Ricketts and Minnie Ricketts, free of charge, for demonstration purposes, that the said Albert Ricketts and Minnie Ricketts were to receive a certain sum of money as commissions for every demonstrative purchaser who came to examine and look at the said electric cordide plant as aforesaid, by means of which false representations and pretenses as aforesaid, the said Albert Ricketts and Minnie Ricketts delivered them by the time, he, the said Percy E. Sullivan, had then and there obtained the money and signatures of the said Albert Ricketts and Minnie Ricketts, to a certain written instrument in the words and figures and [illegible]:

[illegible] [illegible]

[illegible] for value received, I [illegible] to pay [illegible] Light Co., or the [illegible] bank, Pittsburg, Illinois, the sum of Twenty-two and 50/100 Dollars with interest from date at the rate of 8 per cent per annum, payable semi-annually, and if not paid at maturity, then and thereafter to pay interest at the rate of [illegible] per cent per annum, payable semi-annually.

The makers and endorsers hereof severally waive presentment for payment, protest, notice of protest, and notice of non-payment of this note and further severally authorize and direct the holder hereof at any time to apply any money received or standing for their joint or several credit toward the payment of this note, whether due by its terms, or not. Each maker of this note is a principal and together with the endorser thereof, severally agrees that no extension of the time of payment with or without my knowledge by receipt of interest or otherwise shall release me from the obligation of thepayment.

If this note is placed in the hands of an attorney at law for collection inthe ordinary course of collection, or by virtue of the power herein conferred. I agree to pay an attorney's fee of twenty-five dollars and ten per cent additional on the excess of principal and interest over and above two hundred dollars. And in consideration of the above indebtedness as a further security therefor, I hereby irrevocably make any attorney at law my attorney for me and in my name to appear in any court of record, in term time or in vacation at any time on or after the date hereof, to waive service of process and confess a judgment on this note in favor of the payee, his assigns or the legal holder, for such sum as then shall appear to be unpaid, including an attorney's fee of twenty-five dollars and ten per cent additional on the excess of principal and interest over and above twohundred dollars, and costs; to agree that no writ of error or appeal shall be prosecuted on such judgment, nor any bill in equity exhibited to interfere therewith; to release all error in entering such judgment or issuing execution thereon; and to consent to immediate execution on such judgment."

P. O. . . . . Albert Rients,
No. . . . . Minnie Rients.
Due . . . . . 19 . ."

Whereas, in truth and in fact the said written instrument as

The states and countries hereof severally waive presentment for payment, protest, notice of protest, and notice of non-payment of this note and further severally authorize and direct the holder hereof at any time to apply any money received or standing for their joint or several credit toward the payment of this note, whether due by its terms, or not. Each maker of this note is a principal and together with the endorser thereof, severally agrees that no extension of the time of payment with or without my knowledge by receipt of interest or otherwise shall release me from the obligation of thepayment.

If this note is placed in the hands of an attorney at law for collection into ordinary course of collection, or by virtue of the power herein conferred, I agree to pay an attorney's fee of twenty-five dollars and ten per cent additional on the excess of principal and interest over and above two hundred dollars. And in consideration of the above indebtedness as a further security therefor, I hereby irrevocably make any attorney at law my attorney for me and in my name to appear in any court of record, in term time or in vacation at any time on or after the date hereof, to waive service of process and confess a judgment on this note in favor of the payee, his assigns or the legal holder, for such sum as then shall appear to be unpaid, including an attorney's fee of twenty-five dollars and ten per cent additional on the excess of principal and interest over and above twohundred dollars, and costs; to waive that no writ of error or appeal shall be prosecuted on such judgment, or any bill in equity exhibited to interfere therewith; to release all error in entering such judgment or issuing execution thereon; and to consent to immediate execution on such judgment."

"O. . . . . .
D. . . . . .
Due . . . . . ."

aforesaid, so prepared and made ready for the names and signatures of the said Albert Rients and Minnie Rients was not a slip of paper by which they the said Albert Rients and Minnie Rients would obtain commissions for every prospective purchaser who came to examine and look at the said electric carbide plant as aforesaid. Nor was it such a slip of paper by which credit could be given of commissions to the said Albert Rients and Minnie Rients as aforesaid, nor was said slip of paper kept in any bank for such purpose as aforesaid, and said slip of paper was not any instrument which was then and there understood by and between the said Percy B. Sullivan and the said Albert Rients and Minnie Rients should execute; all of which the said Percy B. Sullivan well knew, and with the intention then and there to wrong and defraud the said Albert Rients and Minnie Rients, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois."

Robert M. Niven,

States Attorney in and for the County of Livingston and State of Illinois."

Filed Jan 10, 1930.

To this indictment the defendant, through his attorney, made a motion to quash each and everycount of thesame. The court overruled the motion to quash the indictment. The jury was empaneled. The case tried, and the defendant found guilty and sentenced to pay a fine of $1500.00, and to serve nine months in the State Farm at Vandalia. The case is brought to this court for review on a writ of error.

The plaintiff in error by the motion to quash the indictment has challenged the sufficiency of thesame, and that is one of the assignments of error in this court. It is a well settled rule of law that an indictment should charge the facts specifically and not by way of recital, so that the defendant will know exactly what charges he has to meet. In the case of the People v. Berman, 316

aforesaid, so procured and made ready for the names and signatures of the said Albert Ziemke and Minnie Ziemke was not a slip of paper by which they the said Albert Ziemke and Minnie Ziemke would obtain consideration for every promissory purchaser who came to examine and look at the said electric carbide plant as aforesaid. Nor was it such a slip of paper by which credit could be given or consideration to the said Albert Ziemke and Minnie Ziemke as aforesaid, nor was said slip of paper kept in any bank for such purpose as aforesaid, and said slip of paper was not any instrument which was then and there referred by and between the said Percy H. Sullivan and the said Albert Ziemke and Minnie Ziemke should execute; all of which the said Percy H. Sullivan well knew, and with the intention then and there to injure and defraud the said Albert Ziemke and Minnie Ziemke, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

_____
Charles A. Byron,
States Attorney in and for the County of
Livingston and State of Illinois.

Filed Jan 13, 1908.

To this indictment the defendant, through his attorney, made a motion to quash each and everycount of thesame. The court overruled the motion to quash the indictment. The jury was impanelled. The case tried, and the defendant found guilty and sentenced to pay a fine of $2500.00, and to serve nine months in the State Farm at Vandalia. The case is brought to this court for review on a writ of error.

The plaintiff in error by the motion to quash the indictment has challenged the sufficiency of thesame, and that is one of the assignments of error in this court. It is a well settled rule of law that an indictment should charge the crime specifically and not by way of recital. In that the indictment will have sufficient accepted in law to cast. In the case of the People v. Thomas, 124

Ill., 547, the court in discussing the sufficiency of an indictment for the possession of intoxicating liquor say: "This must be shown, however, by an averment of facts, and not by inference, argument or by the statement of the legal conclusions. In Gunning v. People, 189 Ill., 165, in discussing a motion to quash an indictment, it is said: "It is not permissible , in pleading to leave a fact necessary to be averred to be derived by inference from an allegation of a mere conclusion oflaw. All necessary facts should be pleaded with reasonable certainty, and section 6 of division 11 of Criminal Code has not dispensed with that rule. -- Prichard v. People, 149 Ill., 50; McNair v. People, 89 id. 441; 1 Bishop on Crim Proc, sec. 627; Thompson v. People 96, Ill., 159."

In a civil case, where the rules of pleading are not as strict as in criminal cases, it is held to be elementary, following many decisions of this court, that the pleader seeking to charge one with liability must state the facts from which such liability results, as a conclusion of law, and that a pleading is demurrable which states the conclusion of law without stating the facts. (People v. Davis, 112, Ill., 272.) In Wilkinson v. People, 226, Ill., 135, in discussing a motion to quash an indictment, it is said: "The most that can be said in support of the sufficiency of the indictment is that enough can be gathered from the whole indictment to sustain the conviction. In an indictment that is not sufficient, as it might be in a bill in chancery or a declaration. In criminal pleading the highest degree of certainty is always required."

An indictment charging a defendant with the crime of obtaining property by false pretenses should contain the statement or statements made by the defendant in order to obtain money or other property; the reliance of the prosecuting witness upon those statements; the obtaining of property from prosecuting witness; the falsity of the statement; the knowledge that the defendant knew the statement were false when made,

III., 547, the court in discussing the sufficiency of an indictment for the possession of intoxicating liquor say: "This must be shown, however, by an averment of facts, and not by inference, argument or by the statement of the legal conclusions. In Gunning v. People, 9 Ill., 185, in discussing a motion to quash an indictment, it is said: "It is not permissible , in pleading to leave a fact necessary to be averred to be derived by inference from an allegation of a mere conclusion of law. All necessary facts should be pleaded with reasonable certainty, and section 8 of division II of Criminal Code is not dispensed with that rule. -- Pritchard v. People, 149 Ill., 1; McNair v. People, 89 id. 441; I Bishop on Crim Proc, sec. 527; Thompson v. People 95, Ill., 189."

In a civil case, where the rules of pleading are not as strict as in criminal cases, it is held by the Supreme Court, following many decisions of this court, that the pleader seeking to charge one with liability must state the facts from which such liability results, not a conclusion of law, and that a pleading is demurrable which states the conclusion of law without stating the facts. (People v. Davis, 112, Ill., 272.) In Wilkinson v. People, 98, Ill., 178, discussing a motion to quash an indictment, it is said: "The most that can be said in support of the sufficiency of the indictment is that enough can be gathered from the words indicated to sustain the conviction. In an indictment that is not sufficient, as it might be in a bill in chancery or a declaration. In criminal pleading the ultimate facts of criminality is always required."

An indictment charging a defendant with the crime of obtaining property by false pretenses should contain the statement or instrument made by the defendant in order to obtain money or other property; the allegations of the prosecuting witness were false statements; the obtaining of property from prosecuting witness; the falsity of the statement; the conclusion that the defendant knew the statement was false when made.

and the intention to defraud by means of the statements made. The statements charged to have been made by the defendant must be as to present and existing facts and not some future events.

The first count of the indictment fails to charge in language specific and certain the acts relied upon to constitute the false pretenses, and is especially defective in that it does not in positive language state that the statements made by the defendant were in fact false. It is our opinion that the first count of the indictment does not state a cause of action.

The second count of the indictment, with the exception of the charge, that the defendant had desired to install an electric carbide plant in the home of the Rients, and the certain instrument that he had with him at the time, were all things that were to be performed in the future. In some places this instrument in writing is referred to as "that slip of paper", but it is charged in the indictment that it was then and there understood by and between Sullivan and the Rients that the carbide plant was to be installed, etc., that the slip of paper was to contain an agreement on which certain credits should be allowed the Rients for certain commissions due them for exhibiting the light plant after it was installed. In the negative part of this charge the indictment says that this was not a slip of paper which was then and there understood by and between the parties, etc. From an examination of this count of the indictment we are of the opinion that it is not such a clear and concise charge of the acts complained of that meet the requirements of the law relative to the drawing of an indictment.

The third court of the indictment, in a little different language charges the same acts as the first and second counts of the indictment, and each of the counts of the indictment and all the criminal acts charged against the defendant relate to some future event to be performed by the parties with the exception of the possession of the written instrument, or slip of paper.

the intention to defraud by means of the statements made. The statements charged to have been made by the defendant must be as to present and existing facts and not some future events.

The first count of the indictment fails to charge in language specific and certain the acts relied upon to constitute the false pretenses, and is especially defective in that it does not in positive language state that the statements made by the defendant were in fact false. It is our opinion that the first count of the indictment does not state a cause of action.

The second count of the indictment, with the exception of the charge, that the defendant had desired to install an electric carbide plant in the home of Blankenta, and the certain instrument that he had with him at the time, were all things that were to be performed in future. In some places this instrument in writing is referred to as "that slip of paper", but it is charged in the indictment that it was then and there understood by and between Sullivan and the Blanks that the carbide plant was to be installed, etc., that the slip of paper was to contain an agreement on which certain credits should be allowed the Blanks for certain commissions due them for exhibiting the Light plant after it was installed. In the negative part of this charge the indictment says that this was not a slip of paper which was then and there understood by and between the parties, etc. From a consideration of the language of the indictment as one of the opinions that it is not such a clear and concise charge of the acts complained of that meet the requirements of the law relative to the drafting of indictments.

The third count of the indictment, in a little different language states the same acts as the first and second counts of the indictment, and of the counts of the indictment and all the criminal acts charged against the defendant relate to some future events to be performed by the parties with the exception of the possession of the "the indictment", or slip of paper.

We are of the opinion that this indictment does not in clear and positive language state the facts of the offense for which the defendant stands charged, or as required by law, and the trial court erred in overruling the defendant's motion to quash the indictment. The judgment of the Circuit Court of Livingston County is hereby reversed.

Judgment reversed.

Mr. Justice Baldwin took no part in the decision of this case.

8493

78 A

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. JAMES S. BALDWIN, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

269 I.A. 657

BE IT REMEMBERED, that afterwards, to-wit: On FEB 28 1933 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 8493. Ag. No. 1.

IN THE

APPELLATE COURT OF ILLINOIS.

SECOND DISTRICT

February Term, A. D. 1932.

RICHARD FRANK,
Appellant,
vs.
JOHANNA GLINNEY, as Executrix of the Estate of John Glinney, Deceased,
Appellee.

Appeal from the Circuit Court of Will County, Illinois.

WOLFE * * P. J.

Richard Frank started suit in the Circuit Court of Will County against John Glinney, in which he alleged that he had sustained damages when the automobile which he was driving on the highway in said county, commonly designated as State Highway, #113, collided with the cattle of the defendant. To the original declaration filed the defendant interposed a demurrer, which was sutained by the court.

After leave of court, first hadand obtained, the plaintiff filed an amended declaration which is as follows: "that on to-wit, the 28th day of September, A. D., 1929, the Plaintiff was then and there the owner of and lawfully possessed and operating a certain motor vehicle, to-wit, an automobile then and there propelled bya gasoline engine upon and along a certain public highway in the County of Will and State of Illinois, to-wit; a State highway commonly known as the Coal City Road, at or near a place, to-wit: one and one half miles west of theintersection of the said Coal City Road and Illinois State Route Number Four, commonly known as the Chicago and St. Louis Road, in the exercise of due care and

Ap. No. 2.

IN THE

APPELLATE COURT OF ILLINOIS,

[illegible] DISTRICT.

[illegible] Term, A. D. [illegible].

[illegible] WARD,

Appellant,

vs.

[illegible] GRIMINGER, as Executrix of the Estate of John Grimmer, deceased,

Appellee.

Appeal from the Circuit Court of Will County, Illinois.

[illegible] * * p. 1.

Edward Frank started suit in the Circuit Court of Will County against John Grimmer, in which he alleged that he had sustained damages [illegible] an automobile which he was driving on the highway in said county, commonly designated as State Highway, #113, collided with a [illegible] cattle of the defendant. To the original declaration filed [illegible] defendant interposed a demurrer, which was sustained by the court.

After leave of court, first had and obtained, the plaintiff filed an amended declaration which is as follows: "that on to-wit, [illegible] day of December, A. D., 1919, the plaintiff was then and there the owner of and lawfully possessed and operating a certain [illegible] vehicle, to-wit, an automobile like and known [illegible] Dodge [illegible] engine over and along a certain public highway in the County of Will and State of Illinois, to-wit; a State Highway commonly known as the Joliet City road, at or near a place, to-wit; [illegible] and one half miles west of the intersection of the said Joliet [illegible] and Illinois State Bounds from, commonly known [illegible] the Chicago and St. Louis road, in the township of [illegible]

diligence for his own safety and the safety of others, in the lawful use of said highway; and the defendant, was then and there the owner of a certain cow and it was then and there the duty of the said defendant to so manage and control said cow so as not to permit the said cow to run upon the public highway and thereby endanger the life, limb or property of persons lawfully in the use of said highway, and the said defendant in this behalf failed to keep said cow off of said highway at the time and place aforesaid, and the cow was upon the public highway aforesaid, unattended, unrestrained and uncontrolled and as a direct result and in consequence thereof, the automobile so owned and operated by the plaintiff as aforesaid, then and there ran into the said cow of the defendant which was then and there unlawfully upon the highway aforesaid and as a direct result and in consequence of thesaid, the plaintiff was then and there injured and suffered great bruises and injuries about the head, arms, legs and divers other parts of his body and so remained from hence hitherto, during all of which time the plaintiff suffered a great pain in body and mind and will continue to suffer pain in the future and also by means of the premises the plaintiff was forced to and did lay out divers sums of money, amounting to the sum of Five Hundred Dollars in and about attempting to be cured of his injuries as aforesaid, and that certain of said injuries so sustained by the plaintiff are of a permanent nature; and that the plaintiff did further suffer the total loss of his automobile, to-wit; of the sum of Three Hundred Dollars by means of the premises. To the damage of the plaintiff in the sum of Ten Thousand Dollars, and, therefore, he brings his suit."

To this declaration the defendant interposes a plea of general issue.

After the case was at issue, John Glinney died, and Johanna Glinney, as executrix under the last will and testament of John Glinney, deceased, was substituted as party defendant. The case

went to trial before a jurywhich found the defendant 'not guilty'. A motion for a new trial was overruled and the case brought to this court on appeal.

The points relied upon by the appellant for a reversal of the judgment in this case are: First - That the trial court erred in overruling plaintiff's motion for a new trial. Second - That the verdict is against the manifest weight of the evidence. Third - That the court erred in giving the jury improper instructions at the request ofthe defendant.

An examination of the record discloses that the hard road on which the accident occurred is the usual width of a paved road, being eighteen feet wide; that said road had been recently completed and that the shoulders were not fully settled; that while the plaintiff was driving his automobile on said road his car collided with a cow, on said pavement, that was owned by the defendant, and the plaintiff was injured.

Appellant testified that he was driving his car at a rate of speed of approximately 35 miles per hour; that he did not see the cattle on the road until he was within a distance of approximately eighteen feet of them, and that he could not avoid striking the cow and injuring himself and his automobile. He was the only witness that testified in behalf of himself relative as to how the accident occurred. He denied that anybody had charge of the cattle, but did say that he saw a man on horse-back just about the time the accident occurred. Appellant also testified that the lights on his car were in good order and burning brightly.

Frank Glinney, a son of John Glinney, deceased, testified that he was in charge of the cattle in question and was driving them eastward on the hard-road at the time that the accident occurred; that some of the cows were on the concrete and some on the curb; that he was riding on horseback while driving the cattle; that he first noticed a car coming when it was about forty rods up the road; that the car was coming very fast; that he got off of his horse and waved his hat at the man driving the car but the car

went to trial before a jury which found the defendant not guilty. A motion for a new trial was overruled and the case brought to this court on appeal.

The points relied upon by the appellant for a reversal of the judgment in this case are: First - That the trial court erred in overruling plaintiff's motion for a new trial. Second - That the verdict is against the manifest weight of the evidence. Third - That the court erred in giving the jury improper instructions on the request of the defendant.

An examination of the record discloses that the road upon which the accident occurred is the usual width of a paved road, being eighteen feet wide; that said road had been recently completed and that the shoulders were not fully settled; that there was plenty of room for driving the automobile on said road the one motioned with a car, on said pavement, when the driver of the defendant, and the plaintiff's son lighted.

Appellant testified that he was driving his car at a rate of speed of approximately 35 miles per hour; that he did not see the vehicle on the road until he was within a distance of approximately eighteen feet of them, and that he could not avoid striking the car and injuring himself and his passenger. He also testified in behalf of himself relative to the manner the accident occurred. He denied that anything had happened to the vehicle, but that he was on his or our on same-hand pick-up truck the time the accident occurred. Appellant also testified that the lighted on the car was in good order and burning relatively.

Paul Gilmore, a son of John Gilmore, testified that he was in charge of the vehicle in question and was driving them northward on the pavement at the time that the accident occurred. This was at the same date on the occasion and was on the road; that he was riding on horseback while driving the vehicle; that he first noticed a car coming when it was about forty yards on the road; that the car was moving very fast; that he got off of his horse and taken his hat of the mare driving the car but the car

never stopped and he jumped out of the way; that the driver drove his car against one of the cows; that young Glinney was in charge of the cattle and was driving them along the hard-road was established by three other witnesses. Two of them were farmers living in the vicinity of where the accident occurred.

The appellant is corroborated by other witnesses, who testified that the headlights were burning brightly; that he could see at least 200-feet ahead of his car and clear across the road. These same witnesses, however, contradicted him with regard to the rate of speed that he was driving. Two of the witnesses testified that the appellant was going "awfully fast"; the other witness swore that in his opinion the automobile was being driven between 50 and 60 miles per hour just prior to the time the accident occurred.

The plaintiff in his declaration charges that the defendant was negligent in allowing the cattle to run and be upon the hard-road unattended, unrestrained and uncontrolled. It is incumbent upon him to prove these allegations by the greater weight of the evidence. He cannot at the time of the trial prove any other nor different case of negligence than that relied upon in his declaration. In the case of Buckley v. Mandel Bros., 333 Ill., 368, the court, in passing upon this question say: "When the plaintiff sets out in his declaration the negligent acts of the defendant relied on as a basis for a recovery, he must establish those negligent acts, and cannot recover by reason of negligent acts of the defendant not averred in the declaration as a ground of recovery even though the acts proven show the defendant was guilty of negligence which cause the injury."

The jury by their verdict has said that the plaintiff has failed in such proof. The appellant now insists that the finding of the jury is contrary to the weight of the evidence. Unless an examination of the record discloses that this verdict is manifestly against the weight of the evidence, or unless there is other error

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were stopped and he jumped out of the way; that the driver drove
s was against one of the cows; that young Gilmore was in charge
f the cattle and was driving them along the highway; that we
ollowed by three other witnesses. Two of them were farmers living
the vicinity of where the accident happened.

The appellant is corroborated by other witnesses, who testified
at the headlights were burning brightly; that he could see still for 12 feet
e-fear ahead of his car and that other cars were seen. There was
testimony, however, contradicted him with regard to the rate of speed
at he was driving. Two of the witnesses testified that the
ppellant was going "awfully fast"; the other witness swore that in
e opinion the automobile was being driven between 25 and 30 miles per
ur but going no faster than the accident happened.

The plaintiff in his declaration charges that the defendant was
egligent in allowing the cattle to run and be upon the back-road un-
tended, unregistered and uncontrolled. It is incumbent upon him
prove these allegations by the greater weight of the evidence.
cannot at the time of the trial prove any other and different case
negligence than that relied upon in his declaration. In the case
Buckley v. Landed Area., 333 Ill., 388, the court, in reasoning upon
his question say: "When the plaintiff sets out in his declaration
e negligent acts of the defendant relied on as a basis for a re-
very, he must establish those negligent acts, and cannot recover
reason of negligent acts of the defendant not averred in the
declaration as a ground of recovery, even though the acts proven
ere the intentional and willful or negligence which caused the injury."

The jury by their verdict has said that the plaintiff has
illed in such proof. The appellant now insists that the finding
f the jury in favor by the weight of the evidence. Judging by
ebuttal of the appellant's witnesses this this weight is sufficiently
ainst the weight of the evidence, or unless there is other error

in the case, this court would not be justified in setting aside the verdict.

The appellant complains that the court erred in giving certain instructions to the jury in which they claim that the instructions in effect direct a vereict and that the court omitted certain facts that should have been included in such instructions. We have examined these instructions with this criticism in mind and we are not prepared to say that the jury has been in any way misinformed or misled by the instruction defining the law of the case given on the part of the appellee, but taking the instructions as a whole it is our opinion that the jury was fairly instructed.

After an examination of the record we are of the opinion that the evidence shows that the cattle of the defendant were not upon the road in question unattended, unrestrained and uncontrolled, but were being driven along the road fromthe pasture to the home of the defendant by his son Frank Glinney and the jury properly found the defendant 'not guilty'.

The judgment of the circuit court of Will County should be and is hereby affirmed.

Judgment affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31) 7

No. 8528. Ag. No. 10.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D., 1932.

EVERETTL. BEAL, as Trustee under the Last Will and Testament of Gustavus Bruington, Deceased,
Appellee,

vs.

FRANCES MARIE CLOUGH, as Guardian of the Estates of Frances Isabelle Bruington and Gustavus Edward Bruington; and Frances Isabelle Bruington and Gustavus Edward Bruington,
Defendants,

Appeal from the Circuit Court of Warren County, Illinois

FRANCES MARIE CLOUGH, as Guardian of the Estates of Frances Isabelle Bruington and Gustavus Edward Bruington; and Frances Isabelle Bruington,
Appellants,

WOLFE * * P. J.

Everett L. Beal as trustee under the Last Will and Testament of Gustavus Bruington, deceased, instituted a suit in Chancery in the Circuit Court of Warren County, Illinois, against Frances Marie Clough, as guardian of the estates of Frances Isabelle Bruington and Gustavus Edward Bruington, minors, and against said minors individually. The purpose of said suit was to have the court direct the trustee to accept a deed for certain land, commonly called the Shaw land, on which the trustee had loaned funds of the said minors. The bill alleges that Gustavus Bruington died August 29, 1929, and left his Last Will and Testament, which was duly probated in the County Court of Warren County. That the estate was fully settled, and monies to the amount of $54,806.33 was paid to the said Everett L. Beal as trustee under said Will.

No. 5222. No. 10.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D., 1922.

WILLETT, WALL, as Trustee under the Last Will and Testament of Gustavus Brainerd, Deceased,
Appellee,

vs.

FRANCES MARIE GLOUGH, as Guardian of the Estates of Frances Isabelle Brainerd and Gustavus Edward Brainerd; and Frances Isabelle Brainerd and Gustavus Edward Brainerd,
Defendants,

Appeal from the Circuit Court of Warren County, Illinois

FRANCES MARIE GLOUGH, as Guardian of the Estates of Frances Isabelle Brainerd and Gustavus Edward Brainerd; and Frances Isabelle Brainerd,
Appellants.

WOLFE * * P. J.

Gerrett L. Beal as trustee under the Last Will and Testament of Gustavus Brainerd, Deceased, instituted a suit in chancery in the Circuit Court of Warren County, Illinois, against Frances Marie Glough, as guardian of the estates of Frances Isabelle Brainerd and Gustavus Edward Brainerd, minors, and against said minors individually. The purpose of said suit was to have the court direct the trustee to accept a deed for certain land, commonly called the Shaw land, on which the trustee had loaned funds of the said minors. The bill alleges that Gustavus Brainerd died August 24, 1920, and left his Last Will and Testament, which was duly probated in the County Court of Warren County. That the estate was fully settled, and comes to the amount of $54,808.22 was paid to the said Everett L. Beal as trustee under said Will.

The bill also set forth that said Everett Beal accepted said trust and has paid the income annually to the guardian of the grandchildren of said Gustavus Bruington as provided in said Will. Thebill also alleges that the trustee had attached to said bill a report of his acts and doings from the time of his appointment as such trustee down to the present time. The bill sets forth in detail what the trustee had done relative to the partitioning of certain lands and the management of the lands of the cestui que trust.

The bill further alleges that the Will of Gustavus Bruington did not require the trustee to give any bond, nor did it waive the giving of a bond; that the complainant has never given a bond as such trustee; that the guardian of the beneficiaries has demanded that the complainant give a bond and the complainant is willing to give such bond if paid for out of the trust estate. The bill prays for a guardian ad litem to be appointed for the minors. That the trustee be authorized to take charge of the land in question; that the court approve his report as trustee and fix the amount of the bond to be given, and prays for general relief including the payment of costs of the suit and reasonable solicitor's fees out of the trust estate. Attached to the bill was a copy of the Will of Gustavus Bruington.

The defendants were all residents of California and were served by publication and mail. Frances Isabelle Bruington, one of the grandchildren of the testator at the time of the suit, had arrived at the age of eighteen years and filed an answer jointly with her mother, Frances Marie Clough as guardian. They admit the death of the decedent and statement of his heirship and probate of his Will and partition of his real estate and acceptance of the trust. The defendants deny that the complainant had rendered accounts of the condition of the trust, but admit that

The bill also set forth that [illegible] Berry's [illegible] and [illegible] and has said the income accruing to the [illegible] of the grandchildren of said Theodore Dwelshauvers as provided in said will.

Theodore also alleges that the testator had adopted a, prior to his death a number of his sons and daughters from the time of his commitment as such trustee down to the present time. The bill sets forth in detail that the trustee had some relatives in the neighborhood of certain lands and the management of the lands of the [illegible] and [illegible].

The bill further alleges that the will of Cornelius Twingstein did not require the trustee to give any bond, nor did it waive the giving of a bond; that the complainant has never given a bond as such trustee; that the guardian of the beneficiaries has demanded that the complainant give a bond and the complainant is willing to give such bond if paid for out of the trust estate. The bill prays for a guardian ad litem to be appointed for the minors. That the trustee be authorized to take charge of the land in question; that the court approve his report as trustee and fix the amount of the bond to be given, and upon the report being filed authorize the payment of the will and testamentary guardian's fees out of the trust estate. Attached to the bill was a copy of the will of testator Twingstein.

The defendants made all manners of objections and were served by publication and well. Frances Dwelshauvers, one of the grandchildren of the testator at the time of the suit, had arrived at the age of eighteen years and filed an answer jointly with her mother, Frances Dwelshauvers by guardian. They admit the death of the testator and relationship of the parties and the [illegible] of the will and particulars of the [illegible] and [illegible] of the trust. The defendants deny the complainant has [illegible] [illegible] of the [illegible] of the trust, but admit that

certain monies had been received from the trustee for the support and maintenance of the beneficiaries; but allege that they have no information as to whether they have received all of the trust income. They neither admit nor deny that it would be for the best interest of the trust to accept title to the Shaw land. They call for strict proof of the allegations of the bill not admitted by the answer, and pray that the trustee be required to make a full report of the trust estate.

The case was referred to a special master in chancery to hear the evidence and report to the court his conclusions of law and facts. The evidence was heard and the matter reported that the trustee had made a full and complete report of his acts and doings; that it was for the best interest of the trust that the trustee accept the deed to the land in question; that a reasonable fee for the trustee for handling the estate would be $600.00, which amount the trustee had charged against the estate in his report.

The special master further reported that the expenditure of $1418.75 from the corpus of the estate to pay the last illness and funeral expenses of Marie Adeline Bruington was not a proper charge against the estate, and that the same should be charged against the trustee personally.

Objections were filed to this report, which were overruled by the master and by agreement of the parties and permission of the court said objections were to stand in the circuit court as exceptions to said report. At the hearing upon the exceptions before the court the same were overruled and the master's report approved. At the same time testimony was heard as to reasonable solicitor's fees and guardian ad litem fees. No objection was made to the allowance of $150.00 as guardian ad litem fee. The solicitor for the complainant, after detailing the services he

certain models and been received from the trustee for the support and maintenance of the beneficiaries; but alleges that they have no information as to whether they have received all of the trust income. They neither admit nor deny that it would be for the best interest of the trust to authorize sale of the free land. They call for strict proof of the allegations of the bill and submitted by the answer, and pray that the trustee be required to make a full report of the trust estate.

The case was referred to a special master in chancery to hear the evidence and report to the court his conclusions of law and facts. The evidence was heard and the master reported that the trustee had made a full and complete report of his acts and doings; that it was for the best interest of the trust that the trustee accept the deed to the land in question; that a reasonable fee for the trustee for handling the estate would be $200.00, which amount the trustee had charged against the estate in his accounts.

The special master further reported that the expenditure of $1,417 from the proceeds of the mortgage to pay the land claims and funeral expenses of Mrs. Martha Dougherty was not a proper charge against the estate, and that the same should be charged against the trustee personally.

Objections were filed to this report, which were overruled by the master and by statement of the matter and conclusion of the court said objections were to stand in the circuit court as exceptions to said report. At the hearing upon the exceptions before the court the same were overruled and the master's report approved. At the same time the trustee was held as to trustee's solicitor's fee and guardian ad litem fee. No objection was made to the allowance of $150.00 as guardian ad litem fee. The solicitor for the complainant, after detailing the services he

rendered, asked for a fee of $1500.00. Two members of the Warren County bar testified that such fee was reasonable. The only evidence offered by the defendants was the schedule of fees at the Warren County bar. The question of solicitor's fees was taken under advisement by the court and later held to be reasonable for the services that he rendered the estate. To this decree the complainant excepted and prayed an appeal to this court as to that part of the decree disallowing the $1418.78. The defendants, Frances Marie Clough as guardian ad litem, and Frances Isabelle Bruington, excepted generally to the decree and jointly and severally prayed an appeal to this court.

While there are twelve different assignment of error, they can be classified in three items. The first is the disallowing of the $1418.78 item and charging that personally against the trustee; that allowance of what is claimed to be an excessive and unreasonable compensation to the trustee; the allowance alleged to be excessive and unreasonable solicitor's fees.

The trustee in making his payment of the money to the minor children of the testator did not divide it into one-thirds, but paid it in a lump sum to the guardian, and the guardian, so far as the evidence in this case discloses, used her best judgment in the expenditure of the money. Marie Adeline Bruington, one of the beneificiaries in the trust estate, was an infant which was normal neither mentally nor physically, and large sums of money had been expended for her care by the guardian. The said child died in January, 1930. There were remaining unpaid bills for the child's last illness, including medical attention and funeral expenses amounting to $1418.78. At the time of the death of this child the guardian had no funds on hand with which to pay these bills, and the trustee had no income from the estate on hand from which he could advance this amount. The guardian requested the

rendered, asked for a fee of $1800.00. The members of the Lawrence County bar testified that such fee was reasonable. The only evidence offered by the defendants was the probable of fees at the Warren County bar. The question of politicians's fees was taken under advisement by the court and later held to be reasonable for the services that he rendered the estate. To this decree the complainant excepted and prayed an appeal to this court as to that part of the decree disallowing the $1412.78. The defendants, Frances Marie Jones as guardian ad litem, and Frances Isabelle Washington, excepted generally to the decree and jointly and severally prayed an appeal to this court.

While there are twelve different assignment of error, they can be classified in three items. The first is the disallowing of the $1412.78 item and charging that personally against the trustee; that allowance of that is claimed to be an excessive and unreasonable compensation to the trustee; the allowance alleged to be excessive and unreasonable politicians's fees.

The trustee in making his payment of the money to the minor children of the testator did not divide it into one-thirds, but paid it in a lump sum to the guardian, and the guardian, so far as the evidence in this case discloses, used her best judgment in the expenditure of the money. [illegible] the beneficiaries in the usual manner, as is indeed the normal course generally and [illegible], and [illegible] had been received for our study in the meantime. The case [illegible] in January, 1959. There were [illegible] which the [illegible] fees (lawyer, including [illegible] and [illegible] expenses amounting to $1412.78. At the time of the death of this [illegible] the guardian had in [illegible] which [illegible] $[illegible], and the trustee had [illegible] from the [illegible] which [illegible] would attend this [illegible]. The guardian [illegible]

trustee to pay these bills out of the corpus of the trust estate. The trustee paid these bills out of the corpus of the estate and took back from the guardian individually and as guardian and from the two remaining beneficiaries an indemnity agreement in which they agreed to save the trustee harmless from any personal liability by reason of his advancing this amount of money from the corpus of this estate. It is this item that is in dispute, and the court held that the trustee should be personally liable therefor. In deciding this question it is necessary for the court to construe the Fourth paragraph of the Will of Gustavus Bruington, deceased, which is as follows: "All the rest, residue andremainder of my personal property of whatsoever nature I direct, shall by my said Executor, be converted into cash, and the one-third part of the proceeds thereof paid by my said Executor to my said wife, Frances Marie Bruington, and the remaining two-third part of said proceeds of said personal property shall be held and retained by my said executor, In TRUST, for the following purposes, to-wit:

"To keep the same safely invested in note or notes, secured by real estate mortgage or mortgages, at the prevailing rate of interest and after deducting his costs and reasonable charges in managing said trust, to annually pay over for the maintenance, education and benefit of my children living at my death or born afterwards, or the survivor or survivors thereof, the net annual income defived therefrom for a period of twenty-one years from and after my death, and my said Executor may either himself apply the same for the uses last aforesaid, or may pay the same to the mother or guardian or guardians of such child or children for the purposes aforesaid, without seeing to the application thereof; and in the event of the death of either or any of my said children prior to my death, or at any time prior to twenty-one years after my death leaving child or children surviving, then such child or children of such deceased child of mine shall take and be entitled hereunder

trustee to pay these bills out of the corpus of the trust estate. The trustee paid these bills out of the corpus of the estate and took back from the guardian individually and as guardian and from the two remaining beneficiaries an indemnity agreement in which they agreed to save the trustee harmless from any personal liability by reason of his advancing this amount of money from the corpus of this estate. It is this item that is in dispute, and the court hold that the trustee should be personally liable therefor. In deciding this question it is necessary for the court to construe the fourth paragraph of the Will of Graham Brainerd, deceased, which is as follows: "All the rest, residue and remainder of my personal property of whatsoever nature I direct, shall by my said Executor, be converted into cash, and the one-third part of the aforesaid thereof paid by my said Executor to my said wife, Frances Wells Brainerd, and the remaining two-thirds part of said property of said personal property shall be held and administered by my said executor, in TRUST, for the following purpose, to-wit:

"To keep the same safely invested in note or notes, secured by real estate mortgage or mortgages, at the prevailing rate of interest and after deducting his costs and reasonable charges in managing said trust, to annually pay over for the maintenance, education and benefit of my children living at my death or born afterwards, or the survivor or survivors thereof, the net annual income taking interest for a period of twenty-one years from and after my death, and my said Executor may either himself apply the same for the uses last aforesaid, or may pay the same to the mother or guardian in question of such child or children for the purposes aforesaid, without seeing to the application thereof; and in the event of the death of either or any of my said children prior to my death, or at any time prior to twenty-one years after my death leaving issue or children surviving, then such child or children of such deceased child or also shall take and be entitled thereafter

to such part of the net income as aforesaid as such child would be entitled to had she survived. And from and immediately after twenty-one years from the date of my death, the principal sum of said trust fund, together with any accumulated interest of the income remaining in the hands of said Executor and Trustee, shall, by my said Executor and Trustee be paid over to my said children, share and share alike. And in the event of the death of either or any of my said children prior to the date fixed for distribution herein, leaving child or children surviving, I direct that the share of such child so dying as aforesaid would have received had she or he survivied the period of twenty-one years as aforesaid, shall be paid over by my said Executor and Trustee to such child or children her or him surviving, share and share alike; and in the event such child of mine die within said time leaving no child or children her or him surviving, then the whole of said trust fund with any accumulated interest thereon remaining inthe hands of my said Executor and Trustee shall be paid over to my surviving children at said time and the children then living of such of my children as shall be then dead, in equal share as between brothers and sisters, but so that the children of any child so dying shall take between them only the share which their parent would have taken ifliving."

In the early case of the Illinois Land and Loan Company vs. Bonner, 75 Ill., p. 315, the court laid down a rule of law that has been adhered to in our courts in many of our adjudicated cases, which says: "Where the testator, in the disposition of his property, overlooks a particular event, which, had it occurred to him, he would in all probability have provided against, the court will not rectify the omission by implying or inserting the necessary clause, conceiving it would be too much like making a will for the testator, rather than construing that already made. It is a well

in such case of the net income is otherwise so much which would be applied to and are quotted, nor then and therefore after twenty-one years from the date of my death, the principal sum of said trust fund, together with any accumulated interest in the income remaining in the hands of said Executor and Trustee, shall, in my said Executor and Trustee be held over to my said children, share and share alike. And in the event of the death of either or any of my said children prior to the date fixed for distribution hereof, leaving issue of children surviving, I direct that the share of such child so dying be distributed equally per stirpes to the survivors, share and share alike; and in the event such child of mine die without issue leaving no child or children her or his surviving, then the share of said trust fund with my accumulated interest thereon remaining in hands of my said Executor and Trustee shall be held over to my surviving children at said time and the children then living of such of my children as shall be dead, in equal shares in between instructions per stirpes. But in that the children of any child so dying shall have between them only the gross rights that parent would have taken jointly."

In the recent case of the Illinois Land and Loan Company vs. Bonner, 75 Ill., p. 268, the court laid down a rule of law that has been adhered to in our courts in many of and intricated cases, which says: "Among the testators, in the disposition of his property, evidence a particular event, which, had it occurred at his death, he would in all probability have provided against, the court will not rashly his judgment by inferring an intention the necessary clause, constituting it would be the most idle making a will for the testator, rather than correcting that already made. It is a rule

settled rule that the testator's intention in making a will must be determined by the language used in the will and surrounding circumstances cannot be resorted to for the purpose of importing into that will any intention not expressed therein." - Foss vs. State Bank & Trust Co., 343 Ill., 94. - The object of construing a will is to give effect to the intention of the testator where that intention is not in violation of some rule of law or public policy, and the intention must be determined from the language of the will itself and not from any conjecture that the testator used the language to express an intention or meaning he had in mind, but which he did not express in the will." - Gruner vs. Rice, 333 Ill., 112.

Counsel for appellant relied largely on the case of Longworth vs. Riggs, 123 Ill., 258, as supporting their contention that the trustee has a right to pay the last illness and funeral expense from the corpus of the estate. In the case of Jones vs. Jones, 173 Ill., 472, the Longworth vs.Riggs case is discussed and the reason for the court so holding in the Longworth case are explained. In our opinion the language of the Bruington will is not controlled by the cases cited for the appellants.

When Gustavus Bruington by his Last Will and Testament authorized his trustee to pay the net annual income derived from his estate to his children for a term of twenty-one years, and then directed him what to do with the corpus of the estate, he in our opinion indicated a clear intention that thenet annual income from his estate should be used for the care and maintenance of his grand-children and the court properly found that said amount of $1418.78 was not a proper charge against the corpus of the estate, but should be a charge against Everett Beal personally.

There is no dispute but that the trustee should be allowed reasonable fees for his services which he has rendered the trust

estate. The only question is: Was $600.00 a reasonable fee to be allowed for such service. Evidence was heard in the County Court and upon that evidence and his own personal knowledge of the affairs, the court allowed $600.00 as being a reasonable fee for such service. There is no dispute as to the legality of allowing a reasonable attorney's fees for the service which was rendered for the trustee of the trust estate. The only question is: Was the $1500.00 allowed unreasonable and exorbitant? The court before fixing this fee heard two reputable witnesses, members of the Warren County bar, and on their testimony and his own knowledge, he has fixed that fee at $1500.00. It is our opinion that the trustee's fee and also the attorney's fee are extremely liberal for the services that were performed, but we cannot say they are exorbitant, or that this court would be justified in reversing this case on that question.

We find no reversible error in this case and the decree of the Circuit Court of Warren County is hereby affirmed.

Judgment affirmed.

cases. The sole question is: Has $400.00 a reasonable fee to be allowed for such services. Attorney was hired by the County Court and some 1000 witnesses and file are involved involving of the affairs, the court allowed $800.00 is about a reasonable fee for such service. There is no dispute as to the legality of allowing a reasonable attorney's fees for the service which has rendered for the benefit of the trust estate. The only question is: Is the $1800.00 allowed unreasonable and exorbitant? The court failed fixing this fee heard two reputable attorneys, members of the Harrison County bar, and on their testimony and his own knowledge, he has fixed that fee at $1800.00. It is our opinion that the trustee's fee and also the attorney's fee are extremely liberal for the services that were performed, and in reason we may use knowledge. In this case it would be justified in reversing this case on that question.

We find no reversible error in this case and the decree of the Chancery Court of Pontotoc County is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(65027—1M—9-31) 7

38332

F. W. BAUMAN,

Appellee,

v.

C. I. T. CORPORATION, a Corporation,

Appellant.

Opinion filed March 8, 1933

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE REDEL DELIVERED THE OPINION OF THE COURT.

An appeal was perfected to this court by the defendant from a final order entered in the Municipal Court of Chicago on a finding overruling the defendant's motion to vacate and set aside a judgment against the defendant upon a finding for the plaintiff in the sum of $1,000.

The plaintiff's statement of claim is in trover and alleges in part that on April 19, 1932, the plaintiff was possessed of a Nash sedan of the value of $1,000, and being so possessed the plaintiff lost said chattel when it came into the defendant's possession by finding, and the defendant converted and disposed of said chattel.

The defendant filed its affidavit of merits, wherein the defendant denies that on the 19th day of April, 1932, the plaintiff was lawfully possessed of a certain Nash sedan automobile of the value of $1,000, and denies that the plaintiff lost said chattel and that the chattel came into the defendant's possession and was by it converted to its own use.

On June 30, 1932, the cause came on in regular course for trial, and the defendant not being present, the court, without a jury, after hearing the evidence, found the defendant guilty and assessed plaintiff's damages in the sum of $1,000 in tort, and entered judgment in that amount for the plaintiff.

On July 1, 1932, the court overruled the defendant's motion to vacate this ex parte order of June 30, 1932, and the defendant,

Opinion filed March 8, 1933	
Appellee,	
v.	
S. I. T. CORPORATION, a Corporation,	
Appellant.	

MR. JUSTICE HERRY DELIVERED THE OPINION OF THE COURT.

An appeal was perfected to this court by the defendant from a final order entered in the municipal Court of Chicago on a finding overruling the defendant's motion to vacate and set aside a judgment against the defendant upon a finding for the plaintiff in the sum of $1,000.

The plaintiff's statement of claim is in trover and alleges in part that on April 19, 1932, the plaintiff was possessed of a Nash sedan of the value of $1,000, and being so possessed the plaintiff lost said chattel when it came into the defendant's possession by finding, and the defendant converted and disposed of said chattel.

The defendant filed its affidavit of merits, wherein the defendant denies that on the 19th day of April, 1932, the plaintiff was lawfully possessed of a certain Nash sedan automobile of the value of $1,000, and denies that the plaintiff lost said chattel and that the chattel came into the defendant's possession and was by it converted to its own use.

On June 30, 1932, the cause came on in regular course for trial, and the defendant not being present, the court, without a jury, after hearing the evidence, found the defendant guilty and assessed plaintiff's damages in the sum of $1,000 in tort, and entered judgment in that amount for the plaintiff.

On July 1, 1932, the court overruled the defendant's motion to vacate this ex parte order of June 30, 1932, and the defendant,

in order to perfect its appeal, filed a transcript of the record containing a bill of exceptions, to which was attached a certain purported certificate signed by the Judge presiding at the trial. The bill of exceptions, upon motion of the plaintiff, was stricken by this court for want of a proper certificate signed by the trial judge, certifying that the transcript of record is a correct statement of all of the facts and proceedings, and of all questions of law involved in said case, and the decisions of the Court upon all such questions of law.

The defendant as the relator thereafter filed its petition for a writ of mandamus in aid of the proceeding now pending in this court, wherein F. B. Bauman was the plaintiff and C. I. T. Corporation was a defendant, praying for the issuance of a writ of mandamus commanding John H. Lyle, a judge of the Municipal Court of Chicago, to attach a certificate in the form set forth in the petition and attach his signature as the judge presiding in the Municipal Court in the cause now pending here on appeal.

This petition was answered by the respondent John H. Lyle, a judge of the Municipal Court of Chicago, and was demurred to by the relator.

In an opinion filed by this court in the mandamus proceeding we held that the time for signing and attaching a certificate by the respondent had long expired, and that by the issuance of the writ this court would compel respondent to sign and order filed a different certificate attached to the bill of exceptions from that filed with the Clerk of the Municipal Court of Chicago, and accordingly the relator's demurrer to the respondent's answer was overruled and the issuance of a writ of mandamus denied.

In the consideration of the pending appeal we have before us only the common law record, from which it appears that the pending appeal is from an order of the trial court denying the

in order to perfect the appeal, filed a transcript of the record containing a bill of exceptions, to which was attached a certain purported certificate signed by the judge presiding at the trial. The bill of exceptions, upon motion of the plaintiff, was stricken by this court for want of a proper certificate signed by the trial judge, certifying that the transcript of record is a correct statement of all of the facts and proceedings, and of all questions of law involved in said case, and the decisions of the Court upon all such questions of law.

The defendant in the Juvenile Court filed the petition for a writ of mandamus in aid of the proceeding now pending in this court, wherein P. H. Gannon was the plaintiff and C. I. T. Corporation was a defendant, praying for the issuance of a writ of mandamus commanding John H. Lyle, a judge of the municipal court of Chicago, to execute a certificate in the form set forth in the petition and affixed his signature as the judge presiding in the municipal court in the cause now pending here on appeal.

This petition was answered by the respondent John H. Lyle, a judge of the Municipal Court of Chicago, and was demurred to by the relator.

In an opinion filed by this court in the mandamus proceeding we held that the writ for signing and attaching a certificate by the respondent had long expired, and that by the issuance of the writ this court would compel respondent to sign and order filed a different certificate attached to the bill of exceptions from that filed with the Clerk of the Municipal Court of Chicago, and accordingly the relator's demurrer to the respondent's answer was overruled and the issuance of a writ of mandamus denied.

In the consideration of the pending appeal we have before us only the common law record. From which it appears that the pending appeal is from an order of the trial court denying the

defendant's motion to vacate the judgment entered therein, and inasmuch as no bill of exceptions appears in the record, this court will presume that this order was properly entered by the trial court. The record as it now stands is not questioned in any other respect, and the order denying the defendant's motion to vacate is accordingly affirmed.

ORDER AFFIRMED.

WILSON, P.J. AND HALL, J. CONCUR.

defendant's motion to vacate the judgment entered herein, and hereby is in all of conceivable aspects in the record, this court will grant that motion that this order was improperly entered by the trial court. The record as it now stands is not conclusive in any other respect, and the order denying the defendant's motion is vacate in accordingly affirmed.

CONCUR LITTLEJOHN.

BIGGS, P.J. IN ALL, J. DISSENT.

36196

FRANK McGLINN,
Appellee,

vs.

DEEP ROCK OIL CORPORATION,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

269 I.A. 656

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover $606.21 which he claimed to be due him for selling gasoline for defendant. There was a trial before the court and a finding and judgment in plaintiff's favor for the amount of his claim, and the defendant appeals.

The record discloses that on March 1, 1930, plaintiff as landlord leased to defendant as tenant a certain piece of real estate on which plaintiff was conducting a gas filling station located at 1815 West 99th street. The period covered was from March 1, 1930, to March 1, 1935, and the rental $1200 per annum, payable in monthly installments at the end of each month. The lease provided that the tenant might terminate the lease by giving plaintiff landlord 30 days notice. There are other provisions that are not material to a disposition of the case.

At the same time the parties entered into an agreement whereby plaintiff was to sell the gasoline, etc., of defendant at the station, for which he was to be paid a commission of 2½ cents a gallon, and if the sales exceeded 1,000 gallons a month plaintiff was to receive an additional commission of 1½ cents a gallon. There was no term of employment mentioned in the contract except that it provided that plaintiff would give his exclusive time to the work and would operate the service station "in compliance with the rules and regulations of first party

[illegible]

[illegible]

[illegible]

[defendant] in a manner satisfactory to and at the will of said first party." Plaintiff entered upon the performance of his duties. March 9, 1931, defendant wrote plaintiff a letter in which it stated that due to the recent drop of the price of gasoline it was necessary for defendant to reduce plaintiff's commission 1 cent per gallon and that this reduction would not otherwise affect the employment agreement or the lease. There was other correspondence between the parties, and May 1, 1931, defendant wrote plaintiff, and among other things stated, "please be informed that effective May 2nd, 1931, we are cancelling Authorized Agents Agreement now in effect with you. Effective May 2nd, 1931, and until further notice, the following commissions will be paid to you.

"3 ¢ per gallon on Deep Rock Gasoline
3½¢ per gallon on Kant Rock Ethyl Gasoline."

May 8th following plaintiff's counsel wrote the defendant a letter stating that the defendant was without authority to cancel the employment agreement without also cancelling the lease. Thereafter plaintiff continued to operate the station but was paid the reduced commissions, as mentioned in defendant's letter of May 1st. Afterwards plaintiff brought this suit to recover the balance of the commissions which he claimed to be due him under the employment agreement.

The defendant admitted that it owed plaintiff $118.08. The court held that the employment contract could not be cancelled without the lease also being cancelled, and rendered judgment for plaintiff for the amount of his claim.

The employment agreement and the lease were in one document. They were both executed by the parties at the same time and must therefore, under a well-recognized rule of construction, be construed together. The provision in the employment agreement which provided that plaintiff should give his exclusive time and

[Defendant] in a manner satisfactory to and at the will of said first party." Plaintiff entered upon the performance of his duties. March 9, 1921, defendant wrote plaintiff a letter in which it stated that due to the recent drop of the price of manganese it was necessary for defendant to reduce plaintiff's compensation 1 cent per pound and that this reduction would not adversely affect the employment agreement or the lease. There was other correspondence between the parties, and July 1, 1921, defendant wrote plaintiff, and among other things stated, "please be informed that effective May 2nd, 1921, we are cancelling mutualized Agents Agreement now in effect with you. Effective May 2nd, 1921, and until further notice, the following commissions will be paid to you.

"2 c per pound on Deep Rock concentrates

"1 c per pound on Black Rock Highly Concentrates."

Only six following plaintiff's counsel wrote the defendant a letter stating that the defendant was without authority to cancel the employment agreement without cancelling the lease. Thereupon plaintiff continued to operate the station but was paid the reduced commissions, as mentioned in defendant's letter of May 2nd. Alternate plaintiff brought this suit to recover the balance of the commissions which he claimed to be due him under the employment agreement.

The defendant admitted that it owed plaintiff $12.00. The court held that the employment contract could not be cancelled without the lease also being cancelled, and rendered judgment for plaintiff for the amount of his claim.

The employment agreement and the lease were in one document. They were both executed by the parties at the same time and must therefore, under a well-recognized rule of construction, be construed together. The provision in the employment agreement which provided that plaintiff should give his exclusive time and

attention to the business and that he should operate the service station "in compliance with the rules and regulations of first party in a manner satisfactory to and at the will of said first party," does not refer to a period of time plaintiff is employed, but refers only to the fact that plaintiff must conduct the service station according to the rules and regulations of the defendant as it may see fit to make rules and regulations. In this view of the agreement, the period of time of the employment was not fixed. But when it appears that at the same time and as a part of the same document plaintiff was leasing the premises for a period of five years (which might be terminated by the defendant giving 30 days notice) we think it appears that plaintiff thought he was being employed for the same period of time, subject to termination under the same conditions, as that mentioned in the lease. Here plaintiff was the landlord and the employee, and it is not to be presumed that he would lease the premises for a period of five years and at the same time be employed by defendant to operate the filling station without any fixed period of time. Moreover, any ambiguity in the agreement and lease which were prepared by defendant must be construed most strongly against it. Construing the agreement and lease together, the judgment of the Municipal court of Chicago must be affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

attention to the business and that he should exercise the service station "in compliance with the rules and regulations of first party in a manner satisfactory to and at the will of said first party," does not refer to a period of time plaintiff is employed, but refers only to the fact that plaintiff must conduct the service station according to the rules and regulations of the defendant as it may see fit to make such rules and regulations. In this view of the agreement, the period of time of the employment was not fixed. But when it appears that at the same time and as a part of the same document plaintiff was leasing the premises for a period of five years (which will be terminated by the defendant giving 30 days notice) we think it appears that plaintiff thought he was being employed for the same period of time, subject to termination under the same conditions, as that mentioned in the lease. Here plaintiff was the landlord and the employee, and it is not to be presumed that he would lease the premises for a period of five years and at the same time be employed by defendant to operate the filling station without any fixed period of time. Moreover, any ambiguity in the agreement and lease which were prepared by defendant must be construed more strongly against it. Construing the agreement and lease together, the judgment of the municipal court of Chicago must be affirmed.

AFFIRMED.

Sullivan, P. J., and Lewis, J., concur.

36212

LORETTA R. FARWELL,
Appellee,

vs.

J. ARTHUR FARWELL,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

269 I.A. 656

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse an order entered in the Circuit court of Cook county increasing the temporary alimony he was decreed to pay complainant from $150 a month to $350 a month and an allowance of $1200 as and for complainant's solicitors' fees.

The record discloses that November 11, 1919, complainant filed her amended bill of complaint praying that defendant be compelled to make proper and suitable provision for the separate maintenance of complainant according to statute. The charge in the bill was that the defendant had wilfully deserted complainant June 7, 1915, without cause. Defendant filed exceptions to the amended bill, which have never been disposed of, and obviously no hearing of the cause has ever been had. October 27, 1919, complainant petitioned for the allowance of temporary alimony and solicitors' fees; the matter was referred to a master in chancery who filed his report March 25, 1920. He recommended that an allowance of $150 a month be made and the further sum of $1275 as and for complainant's solicitors' fees. That order was in full force and effect and defendant made all payments required of him by the order.

March 30, 1932, complainant filed her petition praying that her allowance be increased from $150 a month to $500 a month until defendant shall have arrived at the age of sixty years, which will be about two years hence, and that thereafter the allowance be increased to $1200 a month. She also prayed for the allowance of

[illegible]

LORETTA K. FAWCETT,
Appellee,

vs.

J. ARTHUR FAWCETT,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

2069 I.A. 5565

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse an order entered in the Circuit court of Cook county increasing the temporary alimony he was decreed to pay complainant from $180 a month to $250 a month and an allowance of $1500 as and for complainant's solicitors' fees.

The record discloses that December 11, 1919, complainant filed her amended bill of complaint praying that defendant be compelled to make proper and suitable provision for the separate maintenance of complainant according to estate. The charge in the bill was that the defendant had wilfully deserted complainant June 7, 1919, without cause. Defendant filed demurrers to the amended bill, which have never been discussed or, and obviously on hearing of the cause has never been had. October 27, 1919, complainant petitioned for the allowance of temporary alimony and solicitors' fees; the matter was referred to a master in chancery who filed his report March 25, 1920. He recommended that an allowance of $180 a month be made and the further sum of $1275 as and for complainant's solicitors' fees. That order was in full force and effect and defendant made all payments required of him by the order.

March 30, 1922, complainant filed her petition praying that her allowance be increased from $180 a month to $300 a month until defendant shall have arrived at the age of sixty years, which will be about two years hence, and that thereafter the allowance be increased to $1500 a month. She also prayed for the allowance of

solicitors' fees. Defendant filed an affidavit in the nature of a reply to the petition and it was stipulated that defendant would, if present, testify to the facts set up in his affidavit. There was a hearing before the chancellor and an order increasing the monthly allowance and the allowance of solicitors' fees as above stated.

The reason for the increased allowance was that December 21, 1931, defendant's mother died, as a result of which considerable property came to defendant. There was some contention on the trial and some argument in the brief as to the amount of income defendant will receive, his counsel taking the position that until the will of defendant's mother is probated he will not receive certain moneys provided in the mother's will and in a trust established by her in 1918. But we think this point is not of importance here because on the hearing it was stipulated by counsel for defendant that defendant's annual income from the time of the hearing until defendant reaches the age of sixty will be $17,775. A general rule fixing the amount of alimony in such cases has been laid down by our Supreme court in Harding v. Harding, 144 Ill. 588; Cooper v. Cooper, 185 Ill. 163, and other cases. And while it is held that no hard and fast rule can be made to fit all cases, yet, as a general proposition the joint income of the husband and wife will be considered as well as the ages and conditions in life of the parties, their ability to care for themselves, and other circumstances may be shown in fixing the amount of the allowance.

In the Harding case (144 Ill. 588) it is said (pp.599-601): "'The ordinary rule of temporary alimony is to allow the wife about one-fifth of the joint income, deducting of course the income from the wife's separate estate.*** This is regarded as a fair medium, though the proportion will vary, *** according to circumstances.' *** the amount allowed by the courts is by no means uniformly in

solicitors' fees. Defendant filed an affidavit in the nature of a reply to the petition and it was stipulated that defendant would, if present, testify to the facts set up in his affidavit. There was a hearing before the examiner and an order increasing the monthly allowance and the allowance of solicitors' fees as above stated.

The reason for the increased allowance was that December 31, 1931, defendant's mother died, as a result of which considerable property came to defendant. There was some confusion on the trial and some argument in the brief as to the amount of income defendant will receive, his counsel taking the position that until the will of defendant's mother is probated he will not receive certain moneys provided in the mother's will and in a trust established by her in 1919. But we think this point is not of importance here because on the hearing it was stipulated by counsel for defendant that defendant's annual income from the time of the hearing until defendant reaches the age of sixty will be $17,772. A general rule fixing the amount of alimony in such cases has been laid down by our Supreme Court in Gaffney v. Gaffney, 144 Ill. 634; Bauer v. Bauer, 188 Ill. 183, and other cases. And while it is held that no hard and fast rule can be made to fit all cases, yet, as a general proposition the joint income of the husband and wife will be considered as well as the age and conditions in life of the parties, their ability to care for themselves, and other circumstances may be shown in fixing the amount of the allowance.

In the Harding case (144 Ill. 638) it is said (pp.639-640):

"The ordinary rule of temporary alimony is to allow the wife about one-fifth of the joint income, deducting of course the income from the wife's separate estate. This is regarded as a fair medium, though the proportion will vary, as occasion to circumstances."

The amount allowed by the courts is by no means uniformly in

the proportion indicated by the text-writers. It will be found that it varies from a sum sufficient to meet the actual wants and necessities of the wife in some cases, to a third or even a half of the income of the husband. *** If the income of the wife be sufficient to suitably support her, there will ordinarily exist no reason for making an allowance for that purpose. But if the income of the wife be insufficient, and that of the husband be ample, equitable considerations and the weight of authority require *** that such a sum should be allowed from the husband's income as will, when added to her own, enable the wife to live comfortably pending the litigation in the station in life to which he has accustomed her."

In the instant case the wife has no income of her own. And the report of the master to whom the matter was referrred originally in 1919 stated that if the defendant's income should be increased, such as it now is, the wife's allowance might well be increased to $350 a month. We think the allowance by the chancellor was within the rule announced in the authorities, and it must therefore stand.

Complaint is also made of the allowance of $1200 to the complainant as and for her solicitors' fees. Counsel for defendant and one of his associates testified in considerable detail as to the services performed in and about the matter, and the testimony is to the effect that between 90 and 95 hours were employed by counsel in the investigation, preparation and trial of the case, and that such services were reasonably worth $100 a day for a day of six hours, the total amount shown by the testimony being $1500. No evidence was offered by defendant on this question. As stated, the court allowed $1200. We have considered all the evidence in the record on this point as well as the argument made by counsel for the defendant, and while no hard and fast rule can be laid down in such cases, we are unable to say that the allowance of the chancellor

the proportion indicated by the text-writers. It will be found that it varies from a sum sufficient to meet the actual wants and necessities of the wife in some cases, to a third or even a half of the income of the husband. *** If the income of the wife be sufficient to suitably support her, there will ordinarily exist no reason for making an allowance for that purpose. But if the income of the wife be insufficient, and that of the husband be ample, equitable considerations and the weight of authority require *** that such a sum should be allowed from the husband's income as will, when added to her own, enable the wife to live comfortably pending the litigation in the station in life to which he has accustomed her.*

In the instant case the wife has no income of her own. And the report of the master to whom the matter was referred originally in 1919 stated that if the defendant's income should be increased, such as it now is, the wife's allowance might well be increased to $250 a month. We think the allowance by the chancellor was within the rule announced in the authorities, and it must therefore stand.

Complaint is also made of the allowance of $1000 to the complainant on and for her solicitors' fees. Counsel for defendant and one of his associates testified in considerable detail as to the services performed in and about the matter, and the testimony is to the effect that between 90 and 95 hours were employed by counsel in the investigation, preparation and trial of the cause, and that such services were reasonably worth $100 a day for a day of six hours, the total amount paid to the solicitors being $1000. No evidence was offered by defendant on this question. As stated, the court allowed $1000. We have considered all the evidence in the record on this point as well as the argument made by counsel for the defendant, and while on hard and fast rule can be laid down in such cases, we are unable to say that the allowance of the chancellor

was so excessive as to warrant interference on our part.

The order of the Circuit court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

36293

JOSEPH R. VON KESLER,
Appellant,

vs.

KING ELBY,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover $10,000 which he claims to have given defendant, who is a practicing lawyer of Chicago, to invest for plaintiff in stock of a corporation which was then being organized, provided the defendant should first obtain a statement in writing showing the financial condition and history of the partnership being incorporated, and alleging that defendant neglected to obtain such financial statement and that the stock purchased with the $10,000 was of no value.

The declaration as amended was in five counts, to which the defendant filed the general issue and notice of special defenses. There was a jury trial and on January 7, 1932, a verdict for $500 in plaintiff's favor. Afterward defendant's motion for a new trial was allowed and on April 6, 1932, plaintiff by leave of court filed two additional counts, one of which was in trover and the other charged that the defendant had wrongfully converted the $10,000 to his own use. There was another jury trial and a verdict and judgment in defendant's favor, and plaintiff appeals.

Plaintiff testified that he was a fruit grower and manufacturer's agent and had been engaged in that business since 1918; that he became acquainted with defendant about 1914; that defendant was plaintiff's attorney and friend from 1918 until 1930; that defendant acted as his attorney in a number of matters and was vice-president and a director of plaintiff's business, which was incorporated; that

[illegible]

JERRY E. VIA [illegible],

Appellant,

vs.

VIA [illegible],

Appellee.

[illegible] THE DISTRICT COURT

IN [illegible] COUNTY.

[illegible]. HUSTON O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover $20,000 which he claims to have given defendant, who is a practicing lawyer of Chicago, to invest for plaintiff in stock of a corporation which was then being organized, provided the defendant should first obtain a statement in writing showing the financial condition and history of the partnership being incorporated, and alleging that defendant neglected to obtain such financial statement and that the stock purchased with the $20,000 was of no value.

The description as amended was in line omnibus, to which the defendant filed the general issue and notice of special defenses. There was a jury trial and on January 7, 1922, a verdict for $800 in plaintiff's favor. A[illegible] defendant's motion for a new trial was allowed and on April 8, 1922, plaintiff by leave of court filed two additional counts, one of which was in tresper and the other charged that the defendant had wrongfully converted the $20,000 to his own use. There was another jury trial and a verdict and judgment for defendant's favor, and plaintiff appeals.

Plaintiff insists that he was a truly general and manufacturer's agent and had been engaged in that business since 1912; that he became associated with defendant about 1914; that defendant was plaintiff's attorney and friend from 1912 until 1917; that defendant acted as his attorney in a number of matters and was [illegible]; that [illegible] a director of plaintiff's business, which was incorporated; that

their friendly relations ceased about April, 1930. He further testified that he had known Peter G. Slaughter and had done business with him for about 30 years. Slaughter was a manufacturer of preserves and jellies and had been a customer of plaintiff's for a number of years. Slaughter conducted his business under the name of Peter G. Slaughter & Co., which was a partnership composed of himself and his son. About June, 1928, defendant and Slaughter had a talk with reference to incorporating Slaughter's business and about plaintiff investing in the stock of the new corporation. Shortly thereafter plaintiff took Slaughter to defendant's law office with the view of having defendant organize a corporation of Slaughter & Co. The defendant, as attorney, organized the corporation and about that time plaintiff gave him two checks of $5,000 each, to be turned over by the defendant for the purchase of stock for the plaintiff in the Slaughter corporation. Shortly thereafter defendant turned over the money to the corporation and received certificates of stock which he delivered to plaintiff. Plaintiff further gave testimony to the effect that Slaughter had advised him that the partnership had been financially successful and was making money; that in discussing at defendant's office the question of plaintiff investing in the proposed corporation, the three persons being present, Slaughter gave plaintiff a card on which were figures purporting to represent the condition of the copartnership; that plaintiff told defendant to have the figures investigated and to get a profit and loss statement from Slaughter covering the business of the partnership from the time it started to July, 1928, and to get a statement showing its resources and liabilities; that defendant agreed to do this; that defendant was in the active practice of law; that a few days later plaintiff again saw defendant and told him to be extremely careful in making a thorough investigation of the partnership; that a few days thereafter defendant called plaintiff on

[illegible] February 1[illegible]. In further [illegible] that he had known Peter G. Slaughter and had been brought with him for about 30 years. Slaughter was a manufacturer of pressures and jellies and had been a customer of plaintiff's for a number of years. Slaughter conducted his business under the name of Peter G. Slaughter & Co., which was a partnership composed of himself and his son. About June, 1[illegible], defendant and Slaughter had a talk with reference to interrupting Slaughter's business and about plaintiff investing in the stock of the new corporation. Shortly thereafter plaintiff took Slaughter to defendant's law office with the view of having defendant organize a corporation of Slaughter & Co. The defendant, as attorney, organized the corporation and about that time plaintiff gave him the checks of $[illegible] each, to be turned over by the defendant for the purchase of stock for the plaintiff in the Slaughter corporation. Shortly thereafter defendant turned over the money to the corporation and received certificates of stock which he delivered to plaintiff. Plaintiff further gave testimony to the effect that Slaughter had advised him that the partnership had been financially successful and was making money; that in discussing at defendant's office the question of plaintiff investing in the proposed corporation, the three persons being present, Slaughter gave plaintiff a card on which were figures purporting to represent the condition of the corporation; that plaintiff told defendant to have the figures investigated and to get a really and true statement from Slaughter showing the business of the partnership from the time it started in July, 1[illegible], and to get a statement showing its resources and liabilities; that defendant agreed to do this; that defendant was in the active practice of law; that a few days later plaintiff again saw defendant and told him he was anxiously anxious to making a thorough investigation of the partnership; that a few days thereafter defendant called plaintiff on

the telephone and told him to bring over $10,000; that on July 2, 1928, plaintiff delivered a check for $5,000 and the same amount on July 20th following. The certificate of incorporation was issued July 6, 1928, to Peter G. Slaughter & Co., authorizing it to carry on the business of canning and preserving, general brokerage commission, and dealing in food products. Plaintiff further testified that in August, 1928, he was in defendant's office and asked him for the profit and loss statement of the Slughter copartnership; that defendant said, "I have not got them;" that plaintiff then said, "You were supposed to get them;" that the bookkeeper was working on the books of Slaughter & Co. and found some irregularities; that a number of times thereafter he talked the matter over with defendant; that in September, 1928, he returned the stock certificates of the Slaughter corporation to defendant and demanded the return of his $10,000.

Defendant testified that he had been practicing law in Chicago since 1896; that he was a master in chancery of the Circuit court; that he had been acquainted with plaintiff for many years and acted as attorney for plaintiff's company but had no financial interest in the company except to hold a share of stock to qualify as a director; that in the latter part of March or April, 1928, plaintiff brought Slaughter and another person to defendant's office and introduced Slaughter to him; that the question of Slaughter's business being turned over to a corporation of the same name was discussed; that in the latter part of June of the same year plaintiff and Slaughter came to defendant's office and plaintiff advised defendant that he had agreed to form a corporation with Slaughter to take over Slaughter's business; that afterward defendant, as attorney, organized the corporation, received the $10,000 above mentioned from plaintiff and turned it over to the Slaughter corporation in payment of stock, which stock

The telegrams and letts ask to bring over $10,000; that on July 4, 1928, plaintiff delivered a check for $8,000 and the same amount on July 20th following. The certificate of incorporation was issued July 6, 1928, to Fred G. Slaughter & Co., authorizing it to carry on the business of canning and preserving, general brokerage commission, and dealing in food products. Plaintiff further testified that in August, 1928, he was in defendant's office and asked him for the profits and loss statement of the Slaughter company; that defendant said, "I have not got them;" that plaintiff then said, "We were supposed to get them;" that the bookkeeper was working on the books of Slaughter & Co. and found some irregularities; that a number of times thereafter he talked the matter over with defendant; that in September, 1928, he returned the stock certificates of the Slaughter corporation to defendant and demanded the return of his $10,000.

Defendant testified that he had been practicing law in Chicago since 1895; that he was a member in chancery of the Illinois bar; that he had been acquainted with plaintiff for many years and acted as attorney for plaintiff's company but had no financial interest in the company except to hold a share of stock to qualify as a director; that in the latter part of March or April, 1928, plaintiff brought Slaughter and another person to defendant's office and introduced Slaughter to him; that the organization of Slaughter & Company Union Stores was in a stenographic or the name name was discussed; that in the latter part of June of the same year plaintiff and Slaughter came to defendant's office and plaintiff asked defendant that he had agreed to take a participation with Slaughter in this deal; that defendant replied; that defendant's secretary, organized the corporation, received defendant, as attorney, organized the corporation, received the $10,000 above mentioned from plaintiff and banked it; that in the Slaughter corporation in payment of stock, which stock

certificates were issued and delivered by defendant to plaintiff, as requested by plaintiff; that plaintiff did not at any time request defendant to secure a financial statement before the $10,000 was turned over to Slaughter & Co., and that this question was not mentioned by plaintiff until long after the money was paid and the stock issued; that the first time plaintiff made any complaint about the investment was in the fall of 1928, when plaintiff stated that the business of Slaughter & Co. was not successful.

Defendant further testified that in May, 1929, plaintiff came to his office and asked him if he would call up Slaughter and ask him for a statement; that he would return in a few days and see defendant about it; that in July or August plaintiff again called and defendant told him he had talked to Slaughter; that in the fall of 1929 plaintiff stated to defendant that the business was not running well and talked of having a receiver appointed; that plaintiff would like to sell his stock to Slaughter; that in May, 1930, plaintiff brought the stock certificates to defendant and stated that Slaughter & Co. was not getting along well and that defendant should not have allowed him to go into that company; and that plaintiff was holding defendant for it, and plaintiff then demanded the $10,000.

Slaughter, called by defendant, testified that he had known plaintiff about 26 or 27 years; that he had purchased fruits from time to time from plaintiff; that in February, 1928, plaintiff and defendant were talking of forming a corporation; that plaintiff had sold goods right along to defendant and had taken the witness over to defendant's office for the purpose of having a corporation formed to take over Slaughter's business. This witness testified at considerable length, but we think it would serve no useful purpose to discuss the testimony further, nor the evidence of other witnesses who

certificates were issued and delivered by defendant to plaintiff, as requested by plaintiff. That plaintiff did not at any time prequest defendant to secure a financial statement before the firm was turned over to Slaughter & Co., and that this question was not mentioned by plaintiff until long after the money was paid and the stock issued; that the first time plaintiff made any complaint about the investment was in the fall of 1873, when plaintiff stated that the business of Slaughter & Co. was not successful.

Defendant further testified that on day, date, plaintiff came to his office and asked him if he would call up Slaughter and ask him for a statement; that he would return in a few days and see defendant about it; that in fact at request plaintiff again called and defendant told him he had talked to Slaughter; that in the fall of 1873 plaintiff stated to defendant that the business was not running well and talked of having a receiver appointed; that plaintiff would like to sell his stock to Slaughter; that in May, 1874, plaintiff brought the stock certificates to defendant and stated that Slaughter & Co. was not getting along well and that defendant should not have allowed him to go into that company; and that plaintiff was holding defendant for it, and plaintiff then demanded the money.

Slaughter, called by defendant, testified that he had known plaintiff about 24 or 27 years; that he had purchased tobacco from time to time from plaintiff; that in February, 1873, plaintiff and defendant were talking of forming a corporation; that plaintiff had said quite right along to defendant and taken the witness over to defendant's office for the purpose of forming a corporation (meaning to take over Slaughter's business. This witness testified at considerable length, but we think it would serve no useful purpose to discuss the testimony further, nor the evidence of other witnesses who

testified on the hearing. It appears, however, that plaintiff, after Slaughter & Co. was incorporated, worked for and drew a salary for some weeks from that concern.

Complaint is made to the giving of instructions requested by defendant, and to the refusal of the court to give instructions tendered by plaintiff. At the request of plaintiff the jury were instructed that if they found from the evidence that defendant, in investing plaintiff's money, was instructed under what conditions the money should be invested and that he negligently and in violation of such instructions substantially departed therefrom or ignored them entirely and invested the money contrary to plaintiff's instructions, that would constitute a conversion by defendant of the $10,000. We think this instruction was wrong because there is no evidence of any conversion in the case. The $10,000 was turned over by defendant to buy the stock, and if defendant failed to follow instructions before doing so there would be no conversion.

The court refused instructions 8, 12 and 13 requested by plaintiff and they are substantially the same as the instruction above referred to; there was therefore no error in refusing these instructions even if they were correct in other particulars.

Complaint is also made to the giving of instruction No. 23 at defendant's request, by which the jury were told in substance that before the plaintiff could recover he must prove by a preponderance of the evidence that at the time of the alleged conversion of the money by defendant, (1) plaintiff was entitled to the possession of it, (2) that defendant wrongfully converted it to his own use, and (3) that plaintiff must have made a demand for it of defendant. The argument is that since the evidence discloses that a demand would have been unavailing, no demand was required. Even if this instruction were correct, just how it could prejudicially affect plaintiff is not clear. He testified that he made a demand for the

testified on the hearing. It appears, however, that plaintiff, after discharge & do. was incorporated, voted for and gave a mortgage to defendant by way for some weeks from that concern.

Complaint is made to the giving of instructions requested by defendant, and to the refusal of the court to give instructions requested by plaintiff. At the request of plaintiff the jury were instructed that if they found from the evidence that defendant, in investing plaintiff's money, was instructed upon such conditions the money should be invested and that he negligently and in violation of such instructions substantially departed therefrom or ignored them entirely and invested the money contrary to plaintiff's instructions, that would constitute a conversion by defendant of the plf.'s.. To which this instruction was strong because there is no evidence of any conversion in the case. The plf.'s.. was turned over by defendant to say the stock, and if defendant failed to follow instructions before doing so there would be no conversion.

The court refused instructions d, 12 and 13 requested by plaintiff and they are substantially the same as the instruction above referred to; there was therefore no error in refusing these instructions even if they were correct in other particulars.

Complaint is also made to the giving of instruction no. 22 at defendant's request, by which the jury were told in substance that before the plaintiff could recover he must prove by a preponderance of the evidence that at the time of the initial conversion of the money by defendant, (1) plaintiff was entitled to the possession of it, (2) that defendant wrongfully converted it to his own use, and (3) that plaintiff must have made a demand for it of defendant. The argument is that since the evidence tends to show a demand would have been unavailing, no demand was required. Even if such instruction were correct, that fact it would prejudicially affect plaintiff is not clear. It testified that he made a demand for the

money and defendant also testified that plaintiff had demanded the money. The only difference was as to when the demand was made. The time when the demand was made was stated by plaintiff to be much earlier than that shown by defendant's testimony.

But in any view of the case, whether there was any error in the admission or exclusion of evidence, or in the giving or refusing of instructions, we would not be warranted in disturbing the verdict and judgment because, under any view of the evidence, there is no merit in plaintiff's claim and no verdict could stand except one for defendant.

We think the evidence all shows that plaintiff knew much more about the business of Slaughter & Co. than did defendant. Plaintiff had been doing business with Slaughter & Co. for a number of years; was very well acquainted with Slaughter; had discussed Slaughter's business with Slaughter with a view to making an investment after the business was incorporated.

There is no evidence in the record that plaintiff ever inquired of defendant as to whether the defendant had obtained the financial statement from Slaughter until after defendant had turned over to Slaughter the $10,000 for the stock, and until it began to develop that Slaughter & Co. was not making money.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

money and informed him together that plaintiff had demanded the money. The only difference was as to when the demand was made. The time when the demand was made was stated by plaintiff to be much earlier than that shown by defendant's testimony.

But in my view of the case, whether there was any error in the admission or exclusion of evidence, or in the giving or refusing of instructions, we would not be warranted in disturbing the verdict and judgment herein, under any view of the evidence. There is no doubt in plaintiff's claim and no verdict could stand except one for defendant.

We think the evidence all shows that plaintiff never made any demand for the balance of $1. That the contract. Plaintiff had been doing business with Slaughter & Co. for a number of years; was very well acquainted with Slaughter; had discussed Slaughter's business with Slaughter with a view to making an investment after the business was incorporated.

There is no evidence in the record that plaintiff ever required of defendant or to whomever the defendant had obtained the financial statement from Slaughter until after defendant had turned over to Slaughter the $10,000 for the stock, and until it began to develop that Slaughter & Co. was not making money.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Barnett, J., concur.

36315

ALPHONSE MERCIER,
Appellant,

vs.

GERARD A. CONNOR, Administrator of Estate of LEONTINE KISZEWSKI, Deceased,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

269 Ill. 656

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

August 27, 1931, Alphonse Mercier filed his petition in the Probate court of Cook county in the matter of the estate of Leontine Kiszewski, deceased, praying that an order be entered adjudicating him to be the owner of $10,400, a United States postal certificate for $500 and $31.01 in a savings account in the First Union Trust & Savings Bank. The Probate court entered an order denying the prayer of his petition and on appeal to the Circuit court of Cook county there was a hearing before the court without a jury, where a similar finding and judgment were entered and he appeals.

The record discloses that Alphonse Mercier, the petitioner, was a brother of the deceased and his claim is that the three items above mentioned were given to him by his sister as a gift, - as his counsel states, "in the nature of a gift causa mortis."

It appears from the evidence that the deceased was about 51 years of age at the time she died March 14, 1931, and that she was a lessee operating a hotel at 1240 West Congress street, Chicago. The lease covered a period of 5 years from April 1, 1930, to March 31, 1935, at a rental, as reduced, of $400 a month. For a number of years she had been engaged in dealing in real estate and in operating a moving picture theater as a partner with a former husband. She had been married three times; her first husband was William VanCastle, who died several years ago; one child was born

38313

ALPHONSE MAROLEK,

Appellant,

vs.

GERARD A. CONNOR, Administrator of Estate of LORENZO KIZEWEKI, Deceased,

Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

August 27, 1931, Alphonse Marolek filed his petition in the Probate court of Cook county in the matter of the estate of Lorenzo Kizewski, deceased, praying that an order be entered adjudicating him to be the owner of $10,400, a United States postal certificate for $500 and $31.01 in a savings account in the First Union Trust & Savings Bank. The Probate court entered an order denying the prayer of his petition and on appeal to the Circuit court of Cook county there was a hearing before the court without a jury, where a similar finding and judgment were entered and he appeals.

The record discloses that Alphonse Marolek, the petitioner, was a brother of the deceased and his claim is that the three items above mentioned were given to him by Kiz shortly as a gift. - as his counsel states, "in the nature of a gift causa mortis."

It appears from the evidence that the deceased was about 21 years of age at the time she died March 14, 1931, and that she was a lessee operating a hotel at 1240 West Chicago street, Chicago. The lease covered a period of 5 years from April 1, 1930, to March 31, 1935, at a rental, as reduced, of $400 a month. For a number of years she had been engaged in dealing in real estate and in operating a moving picture theater as a partner with a former husband. She had been married three times; her first husband was William VanDusseie, who died several years ago; one child was born

of this marriage and at the time in question he was about 28 years of age. Some time after the death of VanCastle she married Frank Levin, with whom she lived for a number of years and from whom she was divorced in 1929. On December 31, 1930, she married Sylvester Kiszewski, who survived her. There is evidence to the effect that she and Kiszewski did not get along well together, and that shortly before her death she stated to a number of persons who testified, that her husband was robbing her and she was afraid he would make away with her in some manner; that she was afraid for her life. There is further evidence to the effect that she thought a great deal of her brother, the petitioner, who conducted a restaurant in Chicago.

The deceased did business under a number of aliases, sometimes under her maiden name, Leontine Mercier. She had an account in the Mid City Trust & Savings Bank in Chicago under the name of Mrs. L. Sylvester; another savings account at the Northern Trust Co. under the name of Marie Levin; and another savings account at the Merchants Loan & Trust Co., where she did business as Leontine Levin; she also had another savings account under the name of Mrs. Marie Finney at the Union Trust & Savings Bank. In 1929 she maintained a box at the National Safe Deposit Co. under the name Marie Mercier.

She left surviving a son, William Levin (who took the name of his step-father), her brother, the petitioner, Alphonse Mercier, Marie Thebus, her sister, and Sylvester Kiszewski, her husband. March 2, 1931, twelve days before her death, she rented a safety deposit box in the Chicago Safe Deposit Co. on LaSalle street; it was in this box that the administrator found the $10,400, the $500 United States postal savings certificate, and the savings bank book showing a balance of $31.01. In addition to these three items de-

of this marriage and at the time in question he was about 28 years of age. Some time after the death of Vandeatie she married Frank Levin, with whom she lived for a number of years and from whom she was divorced in 1928. On December 31, 1930, she married Sylvester Kizewski, who survived her. There is evidence to the effect that she and Kizewski did not get along well together, and that shortly before her death she stated to a number of persons who testified, that her husband was robbing her and she was afraid he would make away with her in some manner; that he was afraid for her life. There is further evidence to the effect that she transferred a great deal of her property, the petitioner, who conducted a restaurant in Chicago.

The deceased did business under a number of aliases, consequently under her maiden name, Josephine Kerzier. She had an account in the Old City Trust & Savings Bank in Chicago under the name of Mrs. L. Sylvester; another savings account at the Northern Trust Co. under the name of Marie Levin; and another savings account at the Merchants Loan & Trust Co., where she did business as Josephine Levin; she also had another savings account under the name of Mrs. Marie Tinney at the Union Trust & Savings Bank. In 1929 she maintained a box at the National Safe Deposit Co. under the name Marie Kerzier.

She left surviving a son, William Levin (who took the name of his step-father), her brother, the petitioner, Alexander Kerzier, Marie Jones, her sister, and Sylvester Kizewski, her husband. March 8, 1931, twelve days before her death, she rented a safety deposit box in the Chicago Safe Deposit Co. on LaSalle street; it was in this box that the administrator found the $10,400, the $500 United States postal savings certificate, and the savings bank book showing a balance of $31.02. In addition to these three items de-

ceased at the time of her death had $186.31 in a checking account at the Mid City Trust & Savings Bank under the name of Mrs. L. Sylvester; cash in a savings account at the Northern Trust Co. in the name of Marie Levin; a balance of $10.91 in a savings account in the Merchants Loan & Trust Co. in the name of Leontine Levin; and goods and chattels appraised at $8,710. She also had four vacant lots in Muskegon county, Michigan.

March 6, 1931, four days after she had rented the safety deposit box on LaSalle street, she was served with a landlord's five-day notice, in which it appeared she was behind $[illegible] in the rent of the hotel on Congress street.

There is evidence in the record to the effect that a short time before her death deceased told several parties she was expecting to leave a good part of her property to her brother, the petitioner, and there is some evidence that she was not on friendly terms with her son. There is, however, evidence to the contrary,- that she intended to leave her property to her son, her brother, the petitioner, and her sister.

The evidence upon which petitioner bases his claim that his sister made a gift to him of the three items found by the administrator in the safety deposit box in LaSalle street, is that March 2, 1931, he went with deceased, at her request, to the First Union Trust & Savings Bank in the loop, where deceased had a savings account. Deceased there drew out $10,400 and immediately obtained a cashier's check for this amount, payable to the order of A. Mercier, the petitioner. The brother then endorsed the check and received the currency from the paying teller. Immediately thereafter the deceased and her brother went to the Chicago Safe Deposit Co., on LaSalle street, where deceased rented a box in the name of Lee LaCoste, the maiden name of her mother. At that time she paid the the Deposit company $3 for the rent of the box and 50¢ for two keys

owned at the time of her death had $136.32 in a checking account at the Mid City Trust & Savings Bank under the name of Mrs. L. Sylvester; each in a savings account at the Northern Trust Co. in the name of Marie Levin; a balance of $16.91 in a savings account in the Merchants Loan & Trust Co. in the name of Caroline Levin; and goods and chattels appraised at $3,710. She also had four vacant lots in Muskegon county, Michigan.

March 6, 1921, four days after she had rented the safety deposit box on LaSalle street, she was served with a landlord's five-day notice, in which it appeared she was behind $200 in the rent of the hotel on Congress street.

There is evidence in the record to the effect that a short time before her death deceased told several persons she was encouraging to leave a good part of her property to her brother, the petitioner, and there is some evidence that she was not on friendly terms with her son. There is, however, evidence to the contrary, that she intended to leave her property to her son, her brother, the petitioner, and her sister.

The evidence upon which petitioner bases his claim that his sister made a gift to him of the three items found by the administrator in the safety deposit box in LaSalle street, is that March 2, 1921, he went with deceased, at her request, to the First Union Trust & Savings Bank in the Loop, where deceased had a savings account. Deceased there drew out $10,400 and immediately obtained a cashier's check for this amount, payable to the order of A. Sprecher, the petitioner. The brother then endorsed the check and received the currency from the paying teller. Immediately thereafter the deceased and her brother went to the Chicago Safe Deposit Co., on LaSalle street, where deceased rented a box in the name of Ina Goste, the maiden name of her mother. At that time she paid the deposit company $3 for the rent of the box and $0.4 for two keys

to the box.

Agnes Thomas, an extra maid working for deceased at her hotel on West Congress street, testified that about March 2, 1931, she had a talk with deceased, who at that time told her she had transferred her money from one bank to another and put it in a safety deposit box; that the deceased then opened her purse, took out two keys and said, "Here is the keys from the box I just deposited my money in;" that a few days thereafter, while doing the housework, the witness stepped on the keys on the floor of the bathroom; that she picked them up and gave them to deceased, who stated they must have fallen out of her bathrobe pocket.

After the death of deceased it was found that Alphonse Mercier, the petitioner, had the two keys in his possession, and after some negotiations between him and the administrator, who was about to forcibly open the box, the keys were turned over to the administrator, and upon opening the box the $10,400 in currency, the $500 U. S. postal savings certificate and the savings bank book were found. No one had authority to open the box but the deceased.

The evidence further shows that immediately after the death of the deceased there was a post mortem examination but the evidence discloses that she died a natural death from chronic bronchial pneumonia myocarditis and arthritis. There was no evidence of poisoning or external violence. There is other evidence in the record, but we think it unnecessary to discuss it further.

The theory of the petitioner is that his sister, because of fears that she had for her life, made a gift of the $10,400 to him when she handed the check to him in the First Union Trust & Savings Bank, as above stated. There is no evidence that she gave him the United States postal savings certificate for $500 or the pass book to the savings bank except that they were found in the safety deposit box after the death of deceased.

to the box.

Agnes Thomas, an extra maid working for deceased at her hotel on West Gorgrass street, testified that about March 2, 1923, she had a talk with deceased, who at that time told her she had transferred her money from one bank to another and put it in a safety deposit box; that the deceased then opened her purse, took out two keys and said, "Here is the keys from the box I just deposited my money in;" that a few days thereafter, while doing the housework, the witness stepped on the keys on the floor of the bathroom; that she picked them up and gave them to deceased, who stated they must have fallen out of her bathrobe pocket.

After the death of deceased it was found that Alphonse Merular, the petitioner, had the two keys in his possession, and after some negotiations between him and the administrator, who was about to forcibly open the box, the keys were turned over to the administrator, and upon opening the box the $16,000 in currency, the $800 U. S. postal savings certificate and the savings bank book were found. No one had authority to open the box but the deceased.

The evidence further shows that immediately after the death of the deceased there was a post mortem examination but the evidence discloses that she died a natural death from chronic suppurative pneumonia myocarditis and nephritis. There was no evidence of poisoning or external violence. There is other evidence in the record, but we think it unnecessary to discuss it further.

The theory of the petitioner is that his sister, because of fears that she had for her life, made a gift of the $16,000 to him when she handed the book to him in the First Union Trust & Savings Bank, as above stated. There is no evidence that she gave him the United States postal savings certificate for $800 or the same book to the savings bank account. They were found in the safety deposit box after the death of deceased.

A great deal is said in the brief filed on behalf of the petitioner as to the law governing gifts causa mortis and some slight discussion of the law governing gifts inter vivos. The theory of the estate was that the deceased drew the $10,400 from the savings bank and put it in a deposit box to avoid her creditors, principally the landlord of the hotel she was conducting. In support of this, counsel point to the fact that she was $800 behind in the payment of her rent, which we have above referred to, and that the hotel was losing money. On the other hand, counsel for petitioner contend all the evidence shows that she had ample property to meet her obligations, as disclosed by the inventory filed by the administrator, which we have above referred to.

Under the law, one claiming property as a gift causa mortis or inter vivos, has the burden of proving that a gift was made by clear and convincing evidence. Rothwell v. Taylor, 303 Ill.226; and in Billard v. Billard, 221 Ill. 86, where a mother after the death of her son claimed title to certain moneys and securities as a gift from him, she having obtained possession of the money and securities before her son's death, it was held that the burden was on the donee to prove the gift "by evidence not equivocal or uncertain." It is also the law that courts lend a very unwilling ear to statements of what dead persons have said. 62 C. S. 493; Jamison v. Roxderfer, No. 36073, Appellate Court, First Dist., not published.

In the case of Telford v. Patton, 144 Ill. 611, the court said (p. 619): "There are three requisites necessary to constitute a donatio causa mortis: 1. the gift must be with a view to the donor's death; 2. it must have been made to take effect only in the event of the donor's death by his existing disorder; 3. there must be an actual delivery of the subject of the donation."

It is clear under the undisputed evidence in this case

A great deal is said in the brief filed on behalf of the petitioner as to the law governing gifts *causa mortis* and some slight discussion of the law governing gifts *inter vivos*. The theory of the estate was that the deceased drew the $10,000 from the savings bank and put it in a deposit box to avoid her creditors, principally the landlord of the hotel she was conducting. In support of this, counsel points to the fact that she was $800 behind in the payment of her rent, which we have above referred to, and that the hotel was losing money. On the other hand, counsel for petitioner contend all the evidence shows that she had ample property to meet her obligations, as disclosed by the inventory filed by the administrator, which we have above referred to.

Under the law, one claiming property as a gift *causa mortis* or *inter vivos*, has the burden of proving that a gift was made by clear and convincing evidence. *Kalkwell v. Taylor*, 304 Ill.320; and in *Wright v. Wright*, 301 Ill. 88, where a mother after the death of her son claimed title to certain money and securities as a gift from him, she having obtained possession of the money and securities before her son's death, it was held that the burden was on the donee to prove the gift "by evidence not equivocal or uncertain." It is also the law that courts land a very unwilling ear to claims of most kind of gifts made by the dead. *Ch. v. Ch.; Ingham v. Bartlett*, No. 30073, Appellate Court, First Dist., not published.

In the case of *Tolford v. Tolford*, 344 Ill. 623, the court said (p. 629): "There are three requisites necessary to constitute a *donatio causa mortis*: 1. the gift must be with a view to the donor's death; 2. it must have been made to take effect only in the event of the donor's death by him existing disorder; 3. there must be an actual delivery of the subject of the donation."

It is clear under the undisputed evidence in this case

that the petitioner failed to come within the rule required to prove a gift causa mortis. The deceased did not meet her death on account of any fear which she expressed, because the undisputed evidence shows she died from natural causes. The question then remains, - Has the petitioner maintained the burden of proving by clear and convincing evidence that the $10,400 was a complete and executed gift so as to constitute a gift inter vivos?

In the Rothwell case, supra, (303 Ill. 226) it was said (p. 230) that "mere possession by one claiming property as a gift, after death of the owner, is universally, we believe, held insufficient to prove a valid gift." The court there further quoted from Millard v. Millard, supra, (221 Ill. 36) as follows: "It was essential to prove that there was an intention on the part of the deceased to transfer the title and right of possession of the property to Jane H. Millard, and that there was a delivery of the subject matter of the gift by which he parted with all control over it.***

"To constitute a valid gift inter vivos *** there must be a delivery *** with intent to transfer the title." To constitute a valid gift inter vivos, possession and title must pass to and vest in the donee and must be irrevocable. Barnum v. Read, 136 Ill. 388.

In the instant case, we think the evidence fails to show that when the deceased gave the check for the $10,400 to her brother on March 2nd she intended to part with all control over the money, because it appears that upon the cashing of the check by him he went with the deceased to the Chicago Safe Deposit Co., where she rented a box, the keys were given to her, and no one but herself had any right to open the box. Moreover, there was considerable conflict in the evidence, and the learned trial Judge, a

that the petitioner failed to come within the rule required to prove a gift *causa mortis*. The deceased did not meet her death on account of any fear which she expressed, because the undisputed evidence shows she died from natural causes. The exception then remains, - Has the petitioner maintained the burden of proving by clear and convincing evidence that the $10,000 was a complete and executed gift so as to constitute a gift *inter vivos*?

In the *Rothwell* case, *supra*, (302 Ill. 396) it was said (p. 320) that "Mere possession by one claiming property as a gift, after death of the owner, is universally, we believe, held insufficient to prove a valid gift." The court there further quoted from *Gilbert v. Gilbert, supra*, (293 Ill. 46) as follows: "It was essential to prove that there was an intention on the part of the deceased to transfer the title and right of possession of the property to Jane E. Gilbert, and that there was a delivery of the subject matter of the gift by which he parted with all control over it.---

"To constitute a valid gift *inter vivos* --- there must be a delivery --- with intent to transfer the title." To constitute a valid gift *inter vivos*, possession and title must pass to and vest in the donee and must be irrevocable. *Bateman v. Ford*, 124 Ill. 326.

In the instant case, we think the evidence fails to show that when the deceased gave the check for the $10,000 to her brother-in-law he intended to part with all control over the money, because it appears that upon the cashing of the check by him he went with the deceased to the Chicago Safe Deposit Co., where she rented a box, the keys were given to her, and no one but herself had any right to open the box. Moreover, there was considerable conflict in the evidence, and the learned trial judge,

man of broad experience, saw and observed the witnesses and was in a much better position to determine the truth than are we, sitting in a court of review where we have but the printed page before us.

Upon a careful consideration of the entire record, we are of the opinion that the petitioner failed to maintain the burden placed upon him by the law to show by clear and convincing evidence that his sister made a gift to him of the property in question.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

son or great experience, and had observed the witnesses and been in a more better position to determine the truth than are we, sitting in a court of review where we have but the printed page before us.

Upon a careful consideration of the entire record, we are of the opinion that the preponderance fails to sustain the burden placed upon him by the law to show by clear and convincing evidence that his sister made a gift to the property in question.

The judgment of the Circuit Court of Cass County is affirmed.

AFFIRMED.

Bakewell, P. J., and Cullen, J., concur.

36358

THE MANTLE LAMP COMPANY OF AMERICA,
Defendant in Error,

vs.

IDA MAI BULTMAN, Individually and as Executrix of the Last Will and Testament of Charles E. Bultman, Deceased,
Plaintiff in Error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

106 47

369 I.A. 656

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Ida Mai Bultman, individually and as executrix of the last will and testament of Charles E. Bultman, deceased, who will be hereinafter referred to as the defendant, seeks to reverse a decree of the Circuit court of Cook county dismissing her cross-bill and decreeing that defendant Ernest D. McDougall, as assignee of Ida M. Bultman, assign certain letters patent to complainant.

October 9, 1923, complainant filed its bill praying for the specific performance of a contract entered into on May 3, 1919, between complainant and Charles E. Bultman, the husband of defendant, and that certain letters patent be assigned to the complainant in accordance with the contract. The bill was answered November 5, 1923, and December 26, 1923, a cross-bill was filed praying that the contract of May 3, 1919, be annulled and cancelled and for other relief. The cross-bill was answered and on February 29, 1924, the cause was referred to a Master in Chancery. Evidence was heard and various other pleadings were subsequently filed. The Master madeup his report; later the case was opened up and further evidence introduced. June 28, 1926, defendant by leave of court amended the prayer of her cross-bill praying that complainant be decreed to pay defendant $70,000. June 3, 1930, the Master's report was filed.

By this appeal Ida May Bulman, individually and as executrix of the last will and testament of Charles E. Bulman, deceased, who will be hereinafter referred to as the defendant, seeks to recover a dower of the Circuit court of Cook county pursuant to the statute and governing that defendant Edward E. Bulman, as assignee of Ida M. Bulman, assign certain interest owned by plaintiff.

Subpoena, dated, specifying that the bill sought for the specific performance of a contract entered into on May 2, 1930, between complainant and Charles E. Bulman, the husband of defendant, and that certain letters patent be assigned to the complainant in accordance with the contract. The bill was answered November 8, 1938, and December 22, 1938, a cross-bill was filed praying that the contract of May 2, 1930, be rescinded and cancelled and for other relief. The cross-bill was answered and on February 27, 1939, the cause was referred to a Master in Chancery. Evidence was heard and various other pleadings were subsequently filed. The Master makes his report, after the case was closed by the taking of evidence, in favor of the defendant. June 22, 1939, defendant by leave of court amended the prayer of her cross-bill praying that complainant be barred of any interest in her. June 3, 1940, the master's report was filed.

He recommended that a decree be entered requiring the assignment of the patent as prayed for upon payment by complainant to defendant of $70,000. The chancellor entered a decree in accordance with the prayer of complainant's bill, overruled the motion as to the payment of $70,000, and dismissed the cross-bill.

The record discloses that for some time prior to 1917 Charles E. Bultman was located in Cincinnati and invented a number of articles on which he had obtained letters patent. He held a majority of the stock in the Keep-Longer Company, located in Cincinnati. Complainant, an Illinois corporation, was engaged in the manufacture of insulated heat-resisting and other products, in Chicago. It heard of and became interested in some of Bultman's patents, and negotiations were had between the parties whereby complainant sought to obtain certain letters patent then owned by the Cincinnati parties and after negotiations were carried on for some time complainant, on December 22, 1917, made a proposition whereby it would obtain an assignment of the patents, and would then manufacture and market vacuum bottles and containers covered by the patents, for which it would pay 5¢ a bottle to the Cincinnati parties. The proposition further provided that complainant should have the option at any time within five years to pay Bultman and his associates, the Cincinnati parties, $30,000 in lieu of the 5¢ a bottle, as above mentioned. The proposition was accepted by the Cincinnati parties; on December 29, 1917, the agreement thus entered into was modified, whereby complainant agreed to pay to the Cincinnati parties a minimum compensation of $[illegible],000 a year. About January 1, 1918, Bultman moved to Chicago, went to work for complainant, and on May 3, 1919, executed and delivered to complainant an agreement which recited that in consideration of one dollar and his employment by complainant he agreed to assign to complainant any and all patents

He recommended that a decree be entered requiring the assignment of the patent as proposed for use, payment by complainant in defendant of $75,000. The chancellor entered a decree in accordance with the prayer of complainant's bill, overruling the motion to be the payment of $70,000, and dismissed the cross-bill.

The record discloses that the same time prior to 1927 Charles E. Hulburn was located in Cincinnati and invented a number of articles on which he had obtained letters patent. He held a majority of the stock in the Deep-Freeze Company, located in Cincinnati. Subsidiary, or fiduciary corporations, was engaged in the manufacture of insulated food-containing and other containers, in Chicago. It found of not became interested in some of Hulburn's patents, and negotiations were had between the parties thereby concerning the terms on which certain letters patent that owned by the corporation should be assigned to Hulburn. Certain parties and after negotiations were carried on for some time subsequent, on December 20, 1927, made a proposition whereby it would obtain an assignment of the patents, and would then manufacture and market vacuum bottles and containers covered by the patents, for which it would pay Hulburn a royalty on the financial plan. The proposition further provided that complainant should have the option at any time within five years to pay Hulburn and his associates, the financial parties, $40,000 in lieu of the royalty a bottle, as above mentioned. The proposition was accepted by the financial parties on December 29, 1927, the agreement was signed and into was modified, thereby complainant agreed to pay to the financial parties a minimum compensation of $2,000 a year. Since January 1, 1928, Hulburn moved to Chicago, went to work for complainant, and on May 1, 1928, received and delivered to complainant an assignment which provided that in consideration of one dollar and the mutual covenants the assigned be merged in complainant and his patents

on inventions he might make during the course of his employment by complainant, without further charges to complainant but at its expense. Beginning about January 1, 1918, he was paid by complainant $100 a week and this was subsequently increased to $125 a week, which was paid to Bultman until the time of his death, May 30, 1923.

It further appears from the evidence that Bultman obtained certain letters patent during his employment by complainant, which he assigned to complainant as provided in the agreement of May 3, 1919.

About 1921 Bultman apparently became dissatisfied with the compensation he was receiving and so informed complainant, and negotiations on this point were carried on by the parties for a considerable period of time, Bultman contending that he should receive at one time certain preferred stock, and later that he should be paid $70,000 in addition to the $125 a week. But the parties never came to an agreement. Drafts of a proposed agreement mentioning the $70,000 were prepared but never executed. Bultman had applied for the patent involved in the bill in this case without complainant's knowledge, and upon learning this complainant requested an assignment of the proposed invention, which Bultman refused; after his death a similar demand was made upon defendant, his widow and executrix, which she likewise refused, claiming that she was entitled to be paid the $70,000. Upon her refusal, the instant suit was brought.

Defendant's position is that the contract executed by Bultman May 3, 1919, was fraudulently obtained by complainant; that his employment by complainant was not alone as an inventor but that part of his duties was what is designated as "promotional services;" that complainant, through its president, agreed to pay $100,000 for the inventions owned by the Cincinnati parties, and

an investigation to which date during the course of his employment by complainant, although Patterson stopped to circulation but at the expense. Implicating Robert Jackson's, Inc., he was paid by some platoons $200 a week and which was subsequently increased to $300 a week, which was paid to Hutson until the time of his death, May 20, 1970.

It further appears from the evidence that Hutson obtained materials Jackson paint during his employment by complainant, which he declared to complainant as provided in the agreement of July 3, 1970.

Upon (?) Hutson apparently became dissatisfied with the compensation he was receiving and he informed complainant, not dissatisfied on this point were carried on by the parties for a considerable period of time, Patterson contending that he should receive at the same material preferred price, and Jackson that he should be paid $70,000 in addition to the $300 a week. Matters finally came to an agreement. Parts of a recorded agreement dated September the $70,000 were prepared but never executed. Hutson had waited for the payment included in the bill to date when clearly unconscionable, and upon learning this complainant requested an assignment of the proposed letter. When Hutson refused, after his death a dispute between the two defendants, his widow and executrix, which was filtered between Jackson, claiming that he was entitled to be paid the $70,000. Upon the return, the instant suit was brought.

Defendant's contention is that the contract assented by Hutson May 5, 1970, was fraudulently obtained by complainant; that his employment by complainant was not alone on an hourly or at that part of his duties was "ordinarily or "personal services" that complainant, through its president, agreed to pay $100,000 for the services owed by the disaffected parties, and

that $30,000 of this was to be paid to the Cincinnati parties, who were the stockholders of the Keep-Longer Company, and the $70,000 paid to Bultman as his own for his services in securing for the complainant control of the Keep-Longer Company.

The record is voluminous. A great deal of evidence was offered which defendant contends sustains her contention that Bultman was to be paid the $70,000. On the other side, complainant offered evidence to the effect that no such agreement had been made.

We have carefully considered all the evidence on this question and think it would serve no useful purpose to analyze it in detail because we have reached the conclusion that the evidence was insufficient to sustain the defendant's contention. The most that can be said is that the evidence shows that after Bultman came to Chicago and entered the employ of complainant he was claiming he should be paid the $70,000, but we are clearly of the opinion that no such agreement was ever reached by the parties.

We are further of the opinion that the decree requiring the specific performance of the agreement made May 3, 1919, is in accordance with the law and the evidence. Defendant contends that the agreement is unenforceable because it is ambiguous; that the evidence in support of the decree in this respect is not clear and convincing; that the execution of it was procured through fraud or mistake; that it lacks mutuality, and that the agreement requiring Bultman to assign to complainant, his employer, all of his inventions was void as against public policy. We think none of these contentions can be sustained. We think the agreement is plain and unambiguous. By it Bultman, in consideration of the $1 and his employment by complainant, agreed to assign to complainant all his rights to any and all inventions he might make or conceive during the period of his employment, without further charge to complainant, but at complainant's expense. There is no evidence in the record

that $50,000 of this was to be paid to the Dinehart partners, who were the stockholders of the Keep-Larger Company, and the $40,000 paid to Bulkman as his own fee for his services in securing for the complainant control of the Keep-Larger Company.

The record is voluminous. A great deal of evidence was offered which included various conflicting characterizations that Bulkman was to be paid the $40,000. On the other side, complainant offered evidence to the effect that no such agreement had been made.

We have carefully considered all the evidence on this question and think it would serve no useful purpose to analyze it in detail because we have reached the conclusion that the evidence was insufficient to sustain the defendant's assertions. The most that can be said is that the evidence shows that after Bulkman came to Chicago and achieved the employ of complainant he was claiming he should be paid the $40,000, but we are clearly of the opinion that no such agreement was ever reached by the parties.

We are further of the opinion that the course regarding the specific performance of the agreement made May 8, 1919, is in accordance with the law and the evidence. Defendant contends that the agreement is unenforceable because it is contended that the evidence in support of the course in this respect is not clear and convincing; that the execution of it was procured through fraud or mistake; that it lacks mutuality, and that the agreement requiring Bulkman to devote to complainant, his employer, all of his business was void as against public policy. We think none of these contentions can be sustained. We think the agreement is plain and unambiguous. By it Bulkman, in consideration of the $1 and his employment by complainant, agreed to devote to complainant all his time to any and all inventions he might make or conceive during the period of his employment, without further charge to complainant, but at complainant's expense. There is no evidence in the record

that this agreement was not obtained fairly by complainant or that Bultman was overreached in the making of it; and having been fully performed, it is not lacking in mutuality. Armstrong Paint & Varnish Co., v. Cent. Gas Co., 301 Ill. 102. The contract having been entered into fairly, we see no reason why it is against public policy for one to be employed by another for a certain compensation, which contract provides that the employee shall assign to his employer any patents he may secure during the period of his employment. Mississippi Glass Co. v. Franzen, 143 Fed. 501.

Complaint is made to the reading of a deposition taken in Boston because it appeared that the witness was a resident of New York City. There is no merit in this contention because there was no motion made by defendant to suppress the deposition before the hearing.

A further point is made that the articles mentioned by the patent in question were not invented by Bultman while he was employed by complainant, but at a time when he was employed by the Aladdin Industries, Inc., and therefore the contract of May 3rd did not cover the patent involved. The evidence shows that the Aladdin Industries was a subsidiary of the complainant, all of its stock being owned by complainant, and further that Bultman invented the article covered by the patent in complainant's shop, and that he did the work on his invention under his contract of employment with complainant.

Upon a careful consideration of all the evidence in the record, we are of the opinion that the decree of the Circuit court of Cook county is in accordance with the law and the evidence, and it is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

that this agreement was not obtained fairly by complainant or that Bulkam was overreached in the making of it; and having been fully performed, it is not lacking in mutuality. Kirkpatrick Pulp & Paper Co., v. Cont. Can Co., 44 Ill. App. The contract having been entered into fairly, we see no reason why it is against public policy for one to be employed by another for a certain compensation, which contract provides that the employee shall assign to the employer any patents he may secure during the period of his employment. Blackstone Glass Co. v. Stevens, 140 Ind.502.

Complaint is made to the reading of a deposition taken in Boston because it appeared that the witness was a resident of New York City. There is no merit in this contention because there was no motion made by defendant to suppress the deposition before the hearing.

A further point is made that the articles manufactured by the patent in question were not invented by Bulkam while he was employed by complainant, but at a time when he was employed by the Aladdin Industries, Inc., and therefore the contract of May 3rd did not cover the patent involved. The evidence shows that the Aladdin Industries was a subsidiary of the complainant, all of its stock being owned by complainant, and further that Bulkam invented the article covered by the patent in complainant's shop, and that in his 1929 or 1930 contracts under his contract of employment with complainant.

Upon a careful consideration of all the evidence in the record, we are of the opinion that the decree of the circuit court of Cook county is in accordance with the law and the evidence, and it is affirmed.

AFFIRMED.

Matchett, P. J., and Sullivan, J., concur.

36296

HELEN DENNIS,
Appellee,

vs.

D. S. ROMINS & CO.,
A Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

98 H

269 I.A. 655

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse judgment upon the verdict of a jury for $139.75. The controversy relates to the identity of a woman's coat plaintiff bought from defendant, which is in the business of selling women's garments.

In December, 1930, plaintiff called at defendant's place of business for the purpose of purchasing a coat on the installment plan; she selected a black coat trimmed with Badger fur, costing $139.75, to be delivered to her when the coat was paid for in full; she made a small cash payment at the time and other cash payments at intervals, the last payment being in December, 1931; she says that the coat tendered to her when she made the last payment was not the garment she purchased in the first instance. On the other hand, defendant says that it is the same garment. The jury accepted plaintiff's version and rendered a verdict for the amount which plaintiff had paid to defendant.

To sustain its claim that in 1931 it tendered plaintiff the same garment she purchased in 1930, defendant introduced evidence of its system regulating such sales; this includes a stub or tag attached to the garment, one-half of which is torn off and given to the purchaser, both halves showing the same identifying numbers; these numbers are followed on subsequent receipts for moneys paid and on the sales ticket and ledger. The coat defendant says plaintiff purchased and which it tendered to her when her last

[illegible]

[illegible] MARSH,
Appellee,

vs.

T. S. MORTON & CO.,
a Partnership,
Appellant.

[illegible]
[illegible]
[illegible]

[illegible]

[illegible]

Defendant appeals from an adverse judgment upon the verdict of a jury for $130.75. The controversy relates to the liability of a woman's coat plaintiff bought from defendant, which is in the business of selling women's garments.

In December, 1930, plaintiff called at defendant's place of business for the purpose of purchasing a coat on the installment plan; she selected a black coat trimmed with badger fur, costing $130.75, to be delivered to her when the most was paid for in full; she made a small cash payment at the time and other cash payments at intervals, the last payment being in December, 1931; she says that the coat tendered to her when she made the last payment was not the garment she purchased in the first instance. On the other hand, defendant says that it is the same garment. The jury sustained plaintiff's version and rendered a verdict for the amount which plaintiff had paid to defendant.

To sustain its claim that in 1931 it tendered plaintiff the same garment she purchased in 1930, defendant introduced evidence of the system regulating such sales: this includes a tag or tag attached to the garment, specimen of which is [illegible] and given to the purchaser, both parties signing the same identifying numbers; these numbers are followed on subsequent receipts for monies paid and on the sales slips and invoices. The coat defendant says plaintiff purchased and which it tendered to her when her last

payment was made is attached to the record before us. It in general corresponds to the description given by plaintiff of the coat she purchased. If defendant's system was followed perfectly in this case it would seem to demonstrate defendant's claim that the garment tendered is the same that plaintiff purchased. However, the working of this system depends upon whether the original tag or stub attached to the garment when it was sold to plaintiff continued attached to the same garment throughout the entire transaction and was so attached when it was tendered to plaintiff. Inspection of the garment indicates that another tag, the purpose of which does not appear, had at one time been attached and been removed. It is argued that the tag which appears on the garment in evidence might have been removed from the original garment purchased by plaintiff, and attached to the coat in evidence.

However this may be, the jury had the opportunity of seeing and examining an important bit of evidence which is not before us. Plaintiff testified as to the fit of the garment when she purchased it, saying that it was a perfect fit; upon the trial she donned the garment which defendant had introduced in evidence and pointed out to the jury places where she claimed it did not fit; this was with reference to the shoulders, length of sleeves, length of the skirt; the garment she bought was what she designated as a "wrap-around coat" with no belt, while the garment she was showing to the jury required a belt. There was no positive evidence that this garment was the identical garment plaintiff had purchased. The jury, therefore, might properly conclude from this demonstration that plaintiff was justified in her claim that the garment tendered her was not the one she had purchased. As this demonstration is not before us, we have no basis for holding that the jury was manifestly wrong in this conclusion.

payment was made in attached to the record before us. It is proper correspondence to the description given by plaintiff of the work she performed. If defendant's system was followed perfectly in this case it would seem to demonstrate defendant's claim that the payment imposed is the same that plaintiff performed. However, the working of this system depends upon whether the original log or book attached to the payroll when it was sent to plaintiff continued attached to the payroll when it was sent to defendant. Inspection of the payroll indicates that another day, the purpose of which does not appear, had at one time been attached and been removed. It is argued that the log which appears on the payroll in evidence might have been removed from the original payroll presented by plaintiff, and attached to the work in evidence.

However this may be, the jury had the opportunity of seeing and examining an important bit of evidence which is not before us. Plaintiff testified as to the fit of the payroll when she presented it, saying that it was a perfect fit; upon the trial she showed the payroll which defendant had interchanged in evidence and noticed not to the jury places where she claimed it did not fit; this was with reference to the numbers, length of sleeves, length of the shirt; the payroll she thought was what she designated as a "step-ladder book" with no belt, while the payroll she was showing to the jury imposed a belt. There was no evidence without that payroll was the identical payroll plaintiff had purchased. The jury, therefore, might properly conclude from this demonstration that plaintiff was justified in her claim that the payroll imposed her was not the one she had purchased. As this demonstration is not before us, we have no basis for holding that the jury was unreasonable in this conclusion.

Furthermore, plaintiff testified that the coat which she tried on and purchased was a perfect fit, and this is confirmed by one of the sales tickets made out at the time which shows that no alterations were to be made. Plaintiff at the trial, while demonstrating the coat in evidence, pointed out to the jury that the sleeves and the skirt were not of the proper length, and the sales woman for defendant seemed to admit that alterations would be required in this garment to make it a proper fit; thus tending to show that this garment was not the one plaintiff had purchased.

For the reasons indicated we cannot say the verdict is manifestly against the weight of the evidence, and as this is the only point argued the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

Nevertheless, plaintiff insisted that the court should take
total no and maintained the a prefer ile, and this is sustained by
one of the solve liberte made but at the time there were the
alternations were to be made. Finally as the trial, while answer-
ingling the court in evidence, pointed out to the jury that the
slaves and the mills were not of the proper length, and the mains
reason for defendant issued in which that alternations would be re-
quired in this payment to have it a proper fit; this tendis is more
that this payment was not the one plaintiff had purchased.

For the reasons indicated we cannot say the verdict is
manifestly against the weight of the evidence, and so this is one
well paid argued the judgment is affirmed.

AFFIRMED.

Kennedy and Finney, JJ., concur.

36371

CATHERINE GRAMS,
Appellee,

vs.

CHICAGO CITY RAILWAY CO. et al.,
(Defendants.)
On Appeal of CITY OF CHICAGO,
Appellant.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

269 I.A. 655

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff in an action in tort against the City of Chicago and various street railway companies, doing business as Chicago Surface Lines, had a verdict against the City (the Chicago Surface Lines having been dismissed) for $2000; this was reduced by remittitur to $1500, and judgment was accordingly rendered against the City, from which it appeals.

Defendant argues that the court erred in refusing to direct a verdict for the defendant on the ground that the evidence failed to show any negligence on the part of the defendant City of Chicago.

The accident happened on the afternoon of July 19, 1927, on Ashland avenue in Chicago, while plaintiff was a passenger on a street car going south on Ashland; it was a clear day and the track was dry; a garbage truck with three trailers attached, belonging to the city, got in front of the street car, and although the motorman kept ringing his gong the truck with trailers continued on the car tracks for about six blocks. As the truck approached an intersecting street the pavement at this point on the south-bound track was torn up and the space between the rails of the south-bound track and the curb on Ashland was blocked with paving materials, tools and equipment; the flagman motioned to the driver of the truck to turn to the left; the truck with trailers then proceeded south in the north-bound street car track and the south-bound car proceeded alongside of the track and trailers with the motorman on the street

[illegible]

CATHERINE GRAHAM,
Appellee,

vs.

CHICAGO CITY RAILWAY CO. et al.,
(Defendants.)
Ex Appeal of CITY OF CHICAGO,
Appellant.

APPEAL FROM 3RD DIST.
COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE MORRISON
DELIVERED THE OPINION OF THE COURT.

MANDAMUS is an action to test against the City of Chicago the validity where railway companies, doing business on Chicago Surface Lines, had a verdict against the City (the defendants herein having been dismissed) for $2000; this was reduced by remittitur to $1500, and judgment was accordingly entered against the City, from which it appeals.

Defendant argues that the court erred in refusing to direct a verdict for the defendant on the ground that the evidence failed to show any negligence on the part of the defendant City of Chicago.

The accident happened on the afternoon of July 22, 1907, on Ashland avenue in Chicago, while plaintiff was a passenger on a street car going south on Ashland; it was a clear day and the track was dry; a garbage truck with three teamsters attached, belonging to the city, got in front of the street car, and although the motorman kept ringing his gong the truck with teamsters continued on the car tracks for about all blocks. In the same operation of intersecting the street the movement of this point on the south-bound track was been up and the space between the rails of the north-bound track was not the work so Ashland was filled with paving materials, tools and equipment; the flagman maintained in the street at the time in the law; the truck with teamsters that proceeded south in the north-bound street car track and the south-bound car track; the flagman was standing on the street car platform at the time the truck and teamsters left the vicinity of the street car.

car ringing the gong; at the same time a north-bound street car was approaching which stopped to permit the approaching truck to get out of the way.

The jury could properly believe that suddenly the truck turned to the right into the pathway of the south-bound street car and the bumper of the street car struck the hub of the truck; that the street car came to a sudden stop; that plaintiff was preparing to alight from the car and was passing through the rear doorway to the vestibule when the street car bumped into the truck; that she was thrown to the floor, sitting down with one foot in the car and the other in the vestibule; she was taken to a nearby doctor and received first aid treatment.

The motorman of the north-bound car testified that when he saw the truck pull out onto the north-bound track he stopped, and that when the truck made a sharp turn toward the west it then kept on and "sideswiped" the side of the vestibule of the north-bound car. The truck driver testified that the north-bound car came straight for him without stopping, and this compelled him to swing into the path of the south-bound car; that before making the turn into the south-bound car track his helper told him everything was clear; this helper was not called as a witness.

The jury could properly conclude that the driver of the truck could have waited for the south-bound car to pass him before attempting to turn onto the south-bound track; his story that the north-bound car did not stop and that he turned to the right in order to avert a collision with this car is hardly credible. The record furnished no basis for the court to instruct a verdict for the defendant, and the verdict is supported by the evidence.

Defendant asserts that the dismissal of the other co-defendants for a valuable consideration constituted an accord and satisfaction which released all the defendants from liability.

nor finding the body; at the same time a north-bound street car was approaching which stopped to permit the unconscious lawyer to get out of the way.

The jury quite properly believed that notwithstanding the truck turned in the light into the pathway of the south-bound street car and the lawyer of the street car struck the bed of the truck; that the street car came to a sudden stop; that plaintiff was properly in sight from the car and had passed through the rear doorway to the vestibule when the street car bumped into the truck; that she was thrown to the floor, sitting down with one foot in the car and the other in the vestibule; she was taken to a nearby doctor and received first aid treatment.

The motorman of the north-bound car testified that when he saw the truck pull out into the north-bound track in front, he thought that when the driver made a sharp turn toward the west it then kept on and "sideswiped" the side of the vestibule of the north-bound car. The truck driver testified that the north-bound car was straight for the street crossing, and did sideswipe it by reason of the pull of the south-bound car; that after making the turn into the south-bound car there his helper told him everything was clear; this helper was not called as a witness.

The jury could properly conclude that the driver of the truck could have waited for the north-bound car to pass his before attempting to turn into the north-bound track; in what way had the north-bound car did not stop and that he turned to the right to avoid a collision with this car is hardly credible. The street lawyer had no basis for the court to instruct a verdict for the defendant, and the verdict is supported by the evidence.

Defendant argues that he disclaimed of his client as defendants for a valuable consideration surrendered an action and satisfaction which released all the defendants from liability.

The plaintiff was asked whether she was to receive any money from the Surface Lines. The trial court inquired whether or not counsel could stipulate as to the fact, whereupon the attorney for plaintiff said, "Of course, there is a covenant not to sue for $500," to which the attorney for the City said, "All right." The law is, as the City claims, that a release of one of several joint tort feasors is a release as to all, but it is also the rule that a covenant not to sue one of several joint tort feasors does not operate as a release. Reams v. Janoski, 268 Ill. App. 8; Baxter v. Rothschild & Co., 204 Ill. App. 346; Balsley v. Hetzel, 182 Ill. App. 136; Forster v. Sheridan T. & S. Bank, 287 Ill. App. 463; Nickerson v. Duplee, 174 Ill. App. 136; C. & A. Railway Co. v. Averill, 224 Ill. 516; City of Chicago v. Babcock, 143 Ill. 358. A stipulation of fact precludes the necessity for proof of the facts stipulated. Keithley v. County of Clark, 266 Ill. App. 500; Brooks v. Ostrander, 158 Ill. App. 78. Therefore, the record stands uncontradicted that the agreement was a covenant not to sue. Defendant did not request any instruction on the legal effect of the agreement or submit the matter to the jury as a controverted question of fact. Under such circumstances there was no evidence of any release of the other defendants.

Was the judgment excessive? Plaintiff was in the hospital for some thirteen days and was afterward treated by various physicians, some of whom testified, although they are not wholly in agreement as to her injuries. There was evidence that for nearly two years she suffered from pain in her back and seat; finally, in September, 1929, which was more than two years after the injury, she was under the care of Doctor Shapp, who diagnosed a multiple fracture of the coccyx, which is the lower end of the backbone, and some fracture of the nose; he also found a fracture line in the skull; he operated for the fracture of the coccyx and took out four fragments of the coccyx bone, including about one-eighth inch from the

The plaintiff was asked whether she was to receive any money from the defendants. The trial court instructed whether or not covenant could stipulate as to the fact, determine the attorney for plaintiff said, "Of course, there is a covenant not to sue for damages," to which the attorney for the defendants said, "All right." The law is, as the defendants claims, that a release of one of several joint and tort feasors is a release as to all, but it is also the rule that a covenant not to sue one of several joint tort feasors does not operate as a release. Kemp v. Jameson, 208 Ill. App. 6; Mueller v. Illinois Co., 244 Ill. App. 348; Sullivan v. Central, 168 Ill. App. 182; Barnett v. Quaiden I. & K. Mfg., 247 Ill. App. 402; Blackmon v. Dunlap, 174 Ill. App. 128; L. & A. Railway Co. v. Mehlig, 208 Ill. 144; Lily of Chicago v. Bagnoce, 148 Ill. 288. A stipulation of fact establishes the necessity for proof of the fact stipulated. Lockhart v. County of Clark, 208 Ill. App. 346; Kepple v. Yatsmyer, 198 Ill. App. 74. Therefore, the record stands uncontradicted that the agreement was a covenant not to sue. Defendant did not request any instruction on the legal effect of the agreement or submit the matter to the jury as a substantial question of fact. Under such circumstances there was no evidence of any release of the other joint tortfeasors.

Was the judgment excessive? Plaintiff was in the hospital for some thirteen days and was affectually treated by various physicians, some of whom testified, although they are not totally in agreement as to her injuries. There was evidence that for nearly two years she suffered from pain in her head and neck; finally, in December, 1928, which was more than two years after the injury, she was under the care of Dr. Oscar Sherr, who diagnosed a multiple fracture of the cervix, which is the front and of the backbone, and some fractures of the ribs; he also found a fracture like in the skull; he provided for the fracture of the cervix and back and that fracture merely at the neck, indicating there was injury that the

lower end of the backbone; the doctor testified that this was not a new fracture but that it was an old fracture; that such condition causes incessant suffering; he treated plaintiff for approximately two months and she appeared to be much relieved as the result of the operation. He also treated her for headaches and sinus trouble which he said could be traced to the fracture of the nasal bone. Under the circumstances we cannot say that the judgment is too large.

The record fails to show any sufficient reason for reversal, and the judgment is therefore affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

36415

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

WILLIAM KLEATS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

269 I.A. 655

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Kleats, who was petitioner in the court below, was found guilty of a violation of an act to revise the law relating to deadly weapons. See Laws of 1925, p. 339. On March 14, 1932, he was sentenced to one year in the House of Correction and fined $100, the judgment providing that at the expiration of his sentence he should stand committed until the fine was paid. More than thirty days thereafter, on September 7, 1932, he was granted leave to file a petition under section 88 of the Practice act, and the petition was filed.

The petition averred that the petitioner was a citizen of the United States, a resident of the City of Chicago and County of Cook, married, 23 years of age, and that prior to his arrest on March 11, 1932, he was by occupation a drawer of steel, working continuously at his occupation when work was available; that on March 11, 1932, while sitting in the rear seat of an automobile which was driven by one Johnny Munger, with whom sat one Joseph Rupar, certain police officers of the city of Chicago caused Munger to stop the automobile which he was driving and compelled Munger, Rupar and Kleats, the petitioner, to alight and stand on the sidewalk, while the police officers searched the three; that nothing was found on their persons, and that petitioner did not have any concealed weapon upon or about his person.

[illegible]

[illegible]

[illegible]

The petition represented that notwithstanding the fact that he was not in the commission of crime, or suspected of having committed any felony, he was unlawfully arrested by the police officers and illegally detained in the police station in the city of Chicago from March 11 until March 14, 1932, when the three persons above named were taken before Judge J. William Brooks of the municipal court, then presiding in a branch of said court, known as the "Boys' Court," where certain proceedings which appear of record were had; that while incarcerated in the police station he made divers requests upon the officers having him in custody for permission to consult an attorney and his relatives, but that he was not allowed to consult either; that he was denied the right to communicate with an attorney-at-law or any of his relatives and was locked up in the police station.

The petition averred that the three persons named were brought into court together, and that petitioner did not have counsel to represent himself or the advice of any counsel by reason of the refusal of the officers in charge, and having him in custody, to permit him to consult or communicate with any attorney-at-law; that he did not have any opportunity to have witnesses testify for his defense, but that the court entered a finding of guilty against the three and sentenced each to one year in the House of Correction and to pay a fine of $100 and costs; that he was committed to the House of Correction March 14, 1932, although he was not guilty of any offense against the laws of Illinois, which fact he would be able to establish if given a fair and impartial hearing and trial as granted by the laws of the state of Illinois and of the Constitution of the United States of America; that the purported information filed against him, upon which judgment was imposed, was insufficient in law to sustain the judgment, in "that it charges

The petition represented that notwithstanding the fact that he was not in the commission of crime, or suspected of having committed any felony, he was unlawfully arrested by the police officers and illegally detained in the police station in the city of Chicago from before 11 until noon on 14, 1932, when the three persons above named were taken before Judge L. William Brooks of the municipal court, then presiding in a branch of said court, known as the "Dope' Court," where certain proceedings which appear of record were had; that while incarcerated in the police station he made diverse requests upon the officers having him in custody for permission to consult an attorney and his relatives, but that he was not allowed to consult either; that he was denied the right to communicate with an attorney-at-law or any of his relatives and was locked up in the police station.

The petition averred that the three persons named were brought into court together, and that petitioner did not have sufficient time to represent himself or the advice of any counsel by reason of the refusal of the officers in charge, and having him in custody, to permit him to consult or communicate with any attorney-at-law; that he did not have any opportunity to have witnesses testify for his defense, but that the court entered a finding of guilty against the three and sentenced each to one year in the House of Correction and to pay a fine of $100 and costs; that he was committed to the House of Correction March 14, 1932, although he was not guilty of any offense against the laws of Illinois, which fact he would be able to establish if given a fair and impartial hearing and trial as granted by the laws of the state of Illinois and of the Constitution of the United States of America; that the purported information filed against him, upon which judgment was imposed, was insufficient in law to sustain the judgment, in "that it charges

the offense disjunctive thereby charging no offense as required by law;" that although Kunger and Kupar were sentenced and fined at the same time and on the same day the sentence and the fine were imposed against the petitioner, such sentence and fine were entered on the half-sheet, but that the record as shown by the half-sheet shows that after plea of not guilty, waiver of jury trial, trial by the court, the cause was postponed to May 24, 1932, before the same Judge, at which time the cases against Kupar and Kunger were dismissed for want of prosecution.

It is further averred that the complaining witness in each of the said three cases, one Kojzar, one of the police officers who made the illegal arrests, claimed in open court that he found a revolver under the front seat of the automobile, which seat was occupied by Kunger and Kupar, and did not testify that he had found a revolver or any concealed weapon on the petitioner; that he further testified that the revolver which he did find was broken at the time he found it.

The petitioner further averred "that the foregoing facts so stated were the result of excusable mistakes and ignorance of your petitioner and through no negligence on his part, by reason whereof he was deprived of a good and valid defense which he could have used at the trial and which, if known to the court, would have prevented his conviction; that the substantial defect in the Information as aforesaid, was not known to your petitioner and could not have been known because your petitioner had no opportunity to inspect the Information at any time before the trial and until after the conviction and commitment;" that his wife retained the services of an attorney after his commitment; that the attorney has inspected the records and files and obtained a certified copy of the same and brought to the attention of petitioner the substantial defects in the proceedings; that his wife had no

the offense delinquentive thereby charging no offense as required by law;" that although Bunger and Auger were sentenced and fined at the same time and on the same day the sentences and the fines were imposed against the petitioner, each sentence and fine were entered on the half-sheet, but that the record as shown by the half-sheet shows that after plea of not guilty, waiver of jury trial, trial by the court, the cause was postponed to May 24, 1928, before the same judge, at which time the cause against Auger and Bunger were dismissed for want of prosecution.

It is further averred that the complaining witness in each of the said three cases, one Kojzar, one of the police officers who made the illegal arrests, claimed in open court that he found a revolver under the front seat of the automobile, which seat was occupied by Bunger and Auger, and did not testify that he had found a revolver or any concealed weapon on the petitioner; that he further testified that the revolver which he did find was broken at the time he found it.

The petitioner further averred "that the foregoing facts so stated were the result of excusable mistakes and ignorance of your petitioner and through no negligence on his part, by reason whereof he was deprived of a pure and valid defense which he could have used at the trial and which, if known to the court, could have prevented his conviction; that the exculpatory evidence in the information as aforesaid, was not known to your petitioner and would not have been known because your petitioner had no opportunity to inspect the information at any time before the trial and until after the conviction and sentence;" that his wife retained the services of an attorney after his sentence; that the attorney then inspected the records and files and obtained a certified copy of the same and brought to the attention of petitioner the substantial defects in the proceedings; that the wife and

knowledge of his incarceration and trial, as he was prevented from communicating with her as aforesaid, until after he had been committed to the House of Correction; that the certified copy of the record and proceedings in said cause recites that petitioner was represented by counsel at the time he was arraigned and at the time of the purported trial and shows that he was represented by counsel at the time the judgment was entered and sentence imposed; that these facts were untrue, as petitioner was not represented by counsel at any time during the purported trial, he having been denied the right to obtain counsel and the benefit of the advice of an attorney.

The petition alleged that the judgment and sentence were unauthorized by law, as petitioner was informed and believed; that the recital in the records showing that petitioner was represented by counsel should be expunged as the same were not a true recital of the proceedings.

The prayer of the petition is that the judgment be vacated and set aside and that part of the record showing that the petitioner was represented by counsel be expunged; that an order be entered that petitioner be returned from his imprisonment in the House of Correction and brought before the bar of the court in order that matters and things alleged in the petition may be inquired into; that petitioner may be given a full hearing on the same; that a writ of coram nobis issue to the superintendent of the House of Correction for the production of petitioner in court on the return thereof, and that an immediate hearing on the facts be given. The petition also prays for other and further relief. The petition is verified by petitioner.

The court upon examination dismissed the petition and petitioner sued out this writ of error.

knowledge of his incarceration and trial, as he was prevented from communicating with her as aforesaid, until after he had been committed to the House of Correction; that the certified copy of the record and proceedings in said cause recites that petitioner was represented by counsel at the time he was arraigned and at the time of the purported trial and shows that he was represented by counsel at the time the judgment was entered and sentence imposed; that these facts were untrue, as petitioner was not represented by counsel at any time during the purported trial, he having been denied the right to obtain counsel and the benefit of the advice of an attorney.

The petition alleged that the judgment and sentence were unauthorized by law, as petitioner was informed and believed; that the recital in the records showing that petitioner was represented by counsel should be expunged as the same were not a true recital of the proceedings.

The prayer of the petition is that the judgment be vacated and set aside and that part of the record showing that the petitioner was represented by counsel be expunged; that an order be entered that petitioner be returned from his imprisonment in the House of Correction and brought before the bar of the court in order that matters and things alleged in the petition may be inquired into; that petitioner may be given a full hearing on the same; that a writ of <u>habeas corpus</u> issue to the superintendent of the House of Correction for the production of petitioner in court on the return thereof, and that an immediate hearing on the facts be given. The petition also prays for other and further relief.

The petition is verified by petitioner.

The court upon examination dismissed the petition and petitioner sued out this writ of error.

When this record was filed in this court defendant made a motion that the writ of error be made a supersedeas, which was denied. An examination of the briefs has not changed (but on the contrary confirmed) the opinion then entertained. While a written motion substituted for a writ of error coram nobis is applicable to a judgment entered in a criminal case (People v. Crooks, 326 Ill. 266; People v. Long, 346 Ill. 645), such a motion is limited to the purposes for which it might issue at common law, and it does not lie to review the record upon any question of fact or of law which has been adjudicated, nor for alleged false testimony given at the trial, nor for newly discovered evidence. People v. Drysch, 311 Ill. 342. See also Marabia v. Thompson Hospital, 309 Ill. 147. Neither does it lie for the purpose of contradicting the record. People v. Washington, 342 Ill. 356. The petition as a whole does not aver facts such as show fraud or duress against petitioner. Neither does it show diligence on his part.

The judgment of the trial court is therefore affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

When this record was filed in this court defendant made a motion that the writ of error be made a supersedeas, which was denied. An examination of the briefs has not changed (but on the contrary confirmed) the opinion then expressed. "Only a written motion substantial for a writ of error coram nobis is applicable in a judgment entered in a criminal case (People v. Gregory, 326 Ill. 366; People v. Lemon, 348 Ill. 646), such a motion is limited to the purposes for which it might issue at common law, and it does not lie to review the record upon any question of fact or of law which has been adjudicated, nor for alleged false testimony given at the trial, nor for newly discovered evidence. People v. Brown, 411 Ill. 182. See also Kerndin v. Thomson People, 306 Ill. 147. Neither does it lie for the purpose of contradicting the record. People v. Washington, 362 Ill. 290. The petition as a whole does not even recite such as been found or duress against petitioner. Neither does it show diligence on his part.

The judgment of the trial court is therefore affirmed.

AFFIRMED.

Scanlan, P. J., and O'Connor, J., concur.

38219

BONNET-BROWN CORPORATION,
Appellant,

v.

PRESS RECORD PUBLISHING CO.,
a corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

269 I.A. 654

MR. JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

On October 24, 1927, plaintiff caused a judgment by confession for $729.20 to be entered against defendant upon its promissory note, which is signed in its name "by Louis L. Lindley" of "Granite City, Illinois." The note is dated "Feb. 17, 1926," and by it the "undersigned" promised to pay to the order of plaintiff "the principal sum of $1260, in equal monthly installments of $35, payable on or before the 15th day of each month beginning June, 1926," at plaintiff's office in Chicago. Above the signature in small type is the provision that if default be made in the payment of any of the installments, the entire principal sum shall immediately become due and payable, and the further provision in the usual form authorizing a judgment by confession to be entered on the note "at any time hereafter" for such amount as may appear to be unpaid, together with costs and reasonable attorney's fees. In plaintiff's statement of claim it is alleged that there was then due on the note the sum of $679.20. In the judgment as confessed the sum of $50 is added as attorney's fees.

On November 16, 1927, defendant appeared and moved the court to vacate the judgment, supporting the motion by the affidavit of M. M. Campbell, who stated that he is the president and general

[illegible]

[illegible] CONSOLIDATED,
Appellant,

v.

[illegible] MOTOR MANUFACTURING CO.,
a corporation,
Appellee.

[illegible] CIRCUIT COURT OF APPEALS,
[illegible] OF CIRCUIT.

[illegible]

Mr. Justice McLEAN delivered the opinion of the court:

On October 24, 1927, plaintiff secured a judgment by default for $[illegible] to be entered against defendant upon the promissory note, which is signed in its name "By Louis B. Lindley" of "Granite City, Illinois." The note is dated "July 1, 1926," and by its terms "unconditional promises to pay to the order of plaintiff "the principal sum of $[illegible], in equal monthly installments of $[illegible], payable on or before the 10th day of each month beginning June, 1926." At plaintiff's office in Chicago. Above the signature in small type is the provision that it matures be made in the payment of any of the installments, the entire principal sum shall immediately become due and payable, and the further provision in the usual form authorizing a judgment by confession to be entered on the note "at any time hereafter" for such amount as may appear to be unpaid, together with costs and reasonable attorney's fees. In plaintiff's statement of claim it is alleged that there was then due on the note the sum of $[illegible]. In the judgment as entered the sum of [illegible] is added as attorney's fees.

On December 14, 1927, defendant appeared and moved the court to vacate the judgment, supporting the motion by the affidavit of E. A. Hamphill, who stated that he is the president and general

manager of defendant corporation, and familiar with its business affairs, and its books of account, records and minutes. And he therein alleged in substance that when the note was executed, Louis L. Lindley was defendant's president and vested with the usual powers of such official, but that he never had been authorized by defendant, by resolution of the board of directors or otherwise, to execute a power of attorney for the entry of a judgment by confession on a note of defendant; that the indebtedness as evidenced by the note sued upon had been partially paid but that the consideration for the balance claimed to be due had failed; and that defendant was not indebted to plaintiff in any sum. On November 25, 1927, after a hearing, the court ordered that the confessed judgment be opened, that defendant be allowed to make his defense upon the merits, that the confessed judgment in the meantime stand as security, and that Campbell's said affidavit stand as defendant's affidavit of merits. On December 14, 1929, defendant, apparently without leave of court, filed three so-called "additional pleas," which amounted to (a) general issue, (b) non execution of a judgment note, and (c) payment of part of the note and failure of consideration as to the balance claimed to be due.

On May 17, 1932, the cause was tried before a jury and, at the close of plaintiff's evidence, the court directed the jury to find the issues against plaintiff, and, such verdict being returned, entered judgment against plaintiff for costs. From the judgment plaintiff prosecutes the present appeal. No appearance has here been entered or brief filed by defendant.

After reviewing the record we are of the opinion that the court erred in directing a verdict for defendant at the close of plaintiff's evidence and in entering the judgment. The bill of exceptions discloses that Arthur Bonnet, president of plaintiff, was called as a witness for it and he gave certain testimony.

Plaintiff produced the note sued upon, but upon its being offered the court refused to admit it in evidence. In this ruling the court erred. It appeared from defendant's affidavit of merits, by said Campbell, as well as from the testimony of Bennet, that when the note was executed and delivered Lindley was defendant's president. And in the affidavit of merits it was not claimed that Lindley did not have authority to execute a promissory note of defendant, but only that he did not have authority to execute a judgment note. It also appeared from defendant's affidavit of merits that defendant had recognized that the note was its note by making partial payments thereon. The offered note was prima facie evidence of the indebtedness claimed to be due from defendant to plaintiff. And the burden of proving the defenses, either that the note had fully been paid or that there was a failure of consideration as to the claimed unpaid portion of the note, was upon defendant. (Garrett Biblical Institute v. National Fire Insurance Co., 257 Ill. App. 117, 122; Bonnell v. Wilder, 67 Ill. 327, 328; Pierik v. Mueller, 201 Ill. App. 108, 113; Mitchell v. Deeds, 49 Ill. 416, 420.) And when the judgment as confessed was opened and defendant given leave to defend on the merits, plaintiff's cause of action was in the same state as if it had been commenced in the ordinary procedure by summons. (George J. Cooke Co. v. Johnson, 179 Ill. App. 83, 86; Morrison Hotel Co. v. Kirgner, 245 Ill. 431, 434.)

The judgment of May 17, 1932, appealed from, is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, P. J., concurs.

liability produced the note upon which, but upon the being entered the court refused to admit it in evidence. In this making the court erred. It appeared from defendant's affidavit of merits, by said Campbell, as well as from the testimony of Bennett, that when the note was attached and delivered liability was defendant's product. And in the affidavit of merits it was not alleged that liability did not have authority to execute a promissory note of defendant, but only that he did not have authority to execute a judgment note. It also appeared from defendant's affidavit of merits that defendant had arrangement that the note was in his by making partial payments thereon. The affidavit made no prima facie evidence of the indebtedness claimed to be due from defendant to plaintiff. And the burden of proving the defense, either that the note had fully been paid or that there was a failure of consideration in the claimed unpaid portion of the note, was upon defendant. (Barrett National Institute v. National Bank of Commerce, 187 Ill. App. 317, 320; Connell v. Tilden, 47 Ill. App. 1889; Circuit v. Whitney, 201 Ill. App. 108, 1916; Hildebrandt v. Jacobs, 16 Ill. App.)

And when the judgment on confessed was opened and defendant given leave to defend on the merits, plaintiff's cause of action was in the same state as if it had been commenced in the ordinary manner by summons. (George F. Cooke Co. v. Johnson, 170 Ill. App. 80, 84; Northern Bank Co. v. Stevens, 215 Ill. 434, 436.)

The judgment of May 27, 1932, appealed from, is reversed and the cause remanded.

REVERSED AND REMANDED.

Jonkins, P. J., concurs.

36169

RUTH ANDERSON,
Defendant in Error,

v.

ARTHUR ANDERSON,
Plaintiff in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

In January, 1932, Arthur Anderson, defendant in a divorce proceeding in the circuit court of Cook county and hereinafter called defendant, sued out a writ of error from the Supreme Court, seeking to have reversed certain orders entered by the circuit court supplementary to a final decree of February 6, 1931, which granted to Ruth Anderson, hereinafter called complainant, a divorce from defendant on the ground of desertion, and also approved a property settlement between them. On June 24, 1932, the Supreme Court, for reasons stated in its opinion, ordered that the writ of error cause be transferred to this appellate court (Anderson v. Anderson, 349 Ill. 40, 46); and said cause is now here pending.

From the praecipe record certified to by the clerk of circuit court, and from said opinion of the Supreme Court, the following facts appear: On May 18, 1931, complainant filed a petition in the divorce cause, alleging that the decree, besides granting a divorce as prayed, provided for a property settlement between the parties in accordance with their written agreement, and further provides that the court should retain jurisdiction for the purpose of carrying the agreement into effect. She further alleged that the agreement had fully been performed on her part but that defendant had failed to carry out his part of it; that she had deposited with

[illegible]

[illegible] ADAMSON,
Defendant in Error.

v.

[illegible] ADAMSON,
Plaintiff in Error.

MR. JUSTICE BRILLEY DELIVERED THE OPINION OF THE COURT.

In January, 1928, Arthur Adamson, defendant in a divorce proceeding in the circuit court of Cook county and hereinafter called defendant, sued out a writ of error from the Supreme Court, seeking to have reversed certain orders entered by the circuit court supplementary to a final decree of February 6, 1927, which granted to Ruth Adamson, hereinafter called complainant, a divorce from defendant on the ground of desertion, and also awarded a property settlement between them. On June 24, 1928, the Supreme Court, for reasons stated in its opinion, entered that the writ of error cause be transferred to this appellate court. (Adamson v. Adamson, 333 Ill. 44, 45) and is now before us for our decision.

From the pleadings and records in the clerk of circuit court, and from oral argument of the learned counsel, the following facts appear: On May 14, 1921, complainant filed a petition in the divorce court, alleging that the parties, having married a divorce on August, praying for a property settlement between the parties in contemplation of divorce proceedings, and further provided that the court should retain jurisdiction for the purpose of carrying the agreement into effect. The further alleged the agreement had fully been performed on her part but that defendant had failed to carry out his part of the bargain by neglecting and

the Chicago Title & Trust Co., as escrowee, all necessary papers and documents to complete the settlement, but that defendant had failed to deliver merchantable titles to be taken by her; that on May 7, 1931, defendant notified the Title & Trust Co. that his solicitors, Charles M. Haft and Leo J. Hassenauer, had been discharged by him and that it should disregard their instructions in regard to the escrow agreement. The prayer of the petition was that a rule be entered on defendant to show cause why he should not be punished for contempt of court for his failure to abide by the court's order and to carry out the settlement agreement, etc.

On May 26, 1931, on motion of defendant's said solicitors, the court gave them leave to withdraw from the case as solicitors, and on the same day, on complainant's motion, the court ordered that they deposit in the safety deposit vault of a named Chicago bank certain described notes and mortgages in their possession that had been executed by complainant under the settlement agreement, but further ordered that the making of such deposit should not affect their attorney's lien upon the papers, and that the question as to the balance of the fees to be allowed to them should be reserved by the court for future determination. On June 30, 1931, upon the agreement in open court of defendant and said solicitors, the court entered an order that the solicitors retain and have as their fee, for services rendered to defendant, certain real estate mortgages executed by complainant on property to be taken by her under the settlement agreement, and on which, by the terms of the agreement, she was to execute the mortgages to defendant, and that they also retain two-thirds of the money held in escrow by the Title & Trust Co. under the terms of the agreement. It does not appear from the present record that ~~xxxxxxxxxxxx~~ thereafter defendant filed any answer to complainant's said petition, or that any

the Chicago Title & Trust Co., as successor, all necessary papers and documents to complete the settlement, but that defendant had failed to deliver marketable title to be taken by here; that on May 7, 1921, defendant notified the Title & Trust Co. that his solicitors, Charles H. Hull and Leo L. Rosenwater, had been discharged by him and that it should disregard their instructions in regard to the escrow agreement. The prayer of the petition was that a rule be entered on defendant to show cause why he should not be punished for contempt of court for his failure to obey the court's order and to carry out the settlement agreement, etc.

On May 26, 1921, on motion of defendant's said solicitors, the court gave them leave to withdraw from the case as solicitors; and on the same day, on complainant's motion, the court entered that they deposit in the safe deposit vault of a second National Bank strip of coverlet lace and negligee in black paraphernalia that had been received by complainant under the settlement agreement, and further ordered that the making of such deposit should not affect their attorney's lien upon the papers, and that the question as to the balance of the fees to be allowed to them should be reserved by the court for further determination. On June 24, 1921, upon the petition in open court of defendant and said solicitors, the court entered an order that the solicitors retain and have as their fee, for services rendered to defendant, certain said articles mentioned by complainant as property to be taken by her under the settlement agreement, and on which, by the terms of the agreement, she has a security for the payment of the fees, and that they also retain possession of the money held in escrow by the Title & Trust Co. under the terms of the agreement. It does not appear from the present record that the defendant therefor

filed anywhere to complainant's said petition, or that any

orders of the court were entered concerning it except to continue the hearing thereon to a future day.

On September 30, 1931, after due notice to defendant's new solicitor (William J. Robinson) as well as to his former solicitors (Haft and Hassenauer), complainant was given leave to file and filed another or supplementary petition, verified by her, in which she alleged the entry of the divorce decree of February 6, 1931, the approval by the court of the property-settlement agreement, and the retention of jurisdiction by the court for the purpose of carrying that agreement into effect; that by the agreement she was to receive good and merchantable title to five properties, subject to certain mortgages, and was to make certain payments to defendant; that she and defendant made an escrow agreement with the Title & Trust Co., and under it she had executed all deeds, notes, mortgages, trust deeds and other documents required of her; that she had deposited in escrow $5,000, and has become liable to the Title & Trust Co. for a large amount; that the properties deeded to her by defendant have defective titles and she cannot get a guaranty policy on them; that defendant's former solicitors acted for him in the entry of the decree, and she and her solicitor (Benjamin H. Ehrlich) have done everything possible to carry out the settlement agreement, but defendant has refused to cooperate and has hindered and prevented it being carried out; that he has notified the Title & Trust Co. to disregard his solicitor's instructions, and his present solicitor (Robinson) has informed her that he cannot get defendant to sign the necessary papers with the Title & Trust Co.; that complainant has made herself liable on notes and mortgages which are still under the court's jurisdiction, that she had expended large sums of money and that the titles she has procured are of no great value; that because of defendant's failure to carry out the settlement

agreement she is threatened with the foreclosure of one of the properties received by her; that on September 16, 1931, one Lloyd Smith, receiver in a partition proceeding still pending between her and defendant in the superior court of Cook county, caused an order to be entered in that proceeding directing her to show cause why she has failed to pay the sum of $8,500 to said receiver as fees, and also certain fees to that receiver's solicitor, which said fees had previously been ordered to be paid; that under the settlement agreement said fees were to be paid by the Title & Trust Co., as escrowee, out of the funds in its hands, and that she is faced with possible punishment in the superior court proceeding; and that because of the foregoing facts, and particularly because of defendant's action in refusing to carry out the provisions of the settlement agreement, which he is in fact well able to do, complainant asks the court's aid in protecting her property rights. The prayer of the petition is that the circuit court modify its decree of February 6, 1931, by awarding to her such property as she may be entitled to in law or equity, and the return of such sums as may be due to her from defendant; that she be given a proper allowance for permanent alimony and solicitor's fees; that the court cancel and annul said decree of February 6th, only in so far as it affects mortgages and documents executed by her in compliance with the settlement agreement; that the Title & Trust Co. return her papers, documents and money held by it as escrowee; that the former solicitors of defendant surrender all notes and mortgages held by them; that a rule be entered against defendant requiring him to show cause why he should not be punished for contempt of court for failure to comply with the settlement agreement and with the decree of February 6th; and that she be given such other relief as to the court shall seem meet.

On the same day, upon motion of another new solicitor

agreement was in exchange with the forbearance of one of the
proprietors previous by Mary that on September 15, 1921, one Lloyd
Smith, receiver in a partition proceeding still pending between
her and defendant in the Superior court of Cook county, caused an
order to be entered in that proceeding directing her to show cause
why she has failed to pay the sum of $4,800 to said receiver as fees,
and also certain fees to Cook receiver's solicitor, which said fees
had previously been ordered to be paid; that under the settlement
agreement said fees were to be paid by the Title & Trust Co., as
escrowee, one of the funds in its hands, and that she is faced with
possible punishment in the Superior court proceeding; and that because
of the foregoing fraud, and particularly because of defendant's
action in refusing to carry out the provisions of the settlement
agreement, which on its face will also be, complainant asks the
court's aid in preventing her property rights. The gravamen of the
petition is that the circuit court exercising its course of chancery,
1921, by ensuring to her such property as she may be entitled to in
law or equity, and the issues of such cause as may be sent to her from
chancery; that she be given a proper allowance for permanent alimony
and solicitor's fees; that the court compel the defendant to pay
fiduciary obligations, and in the so-called settlement agreement
executed by her in compliance with the settlement agreement that
the Title & Trust Co. return her property, documents and money held by
it as escrowee; that the former solicitors of defendant surrender
all notes and mortgages held by them; that a rule be issued against
defendant requiring him to show cause why he should not be punished
for contempt of court for failure to comply with the settlement
agreement and with the course of chancery; that the court be given
such other relief as to the court shall seem meet.

On the same day, upon motion of another new solicitor

for defendant, one Harry M. Phipps (who entered his appearance as sole solicitor), the court gave leave to defendant to file an answer to the petition and such answer was filed on October 3, 1931, in which defendant admitted the entry of the divorce decree of February 6th, that the same approved the settlement agreement between the parties and that by it the court retained jurisdiction "for the purpose of carrying said agreement into effect," but defendant denied that complainant's petition contained allegations "sufficient to support a decree for a specific performance of a contract," or that the court "possessed equitable powers to enforce said settlement agreement," or that the court had jurisdiction to modify said decree of February 6th. And defendant alleged that there was still pending in the superior court of Cook county, case No. 484,756, a partition suit between the parties which had been commenced by complainant (then defendant's wife) on September 2, 1928, and that the superior court "claims jurisdiction over the same identical property herein referred to." And he urged that the divorce decree be "opened up and vacated," and that he be allowed to file an amended answer and a cross-bill, and for the reason, as alleged, that his former solicitors (Heft and Hassenauer) had violated his instructions in allowing the divorce decree to be entered against him without a contest. And he denied that he was in contempt of court and prayed that the court enter such orders that justice might be done. It will be noticed that in his answer defendant does not deny the material allegations of complainant's petition (in substance that defendant advisedly entered into the settlement agreement, that she in good faith has performed or attempted to perform her part of it, that he, although well able, has failed and refused to perform his part of it and has prevented its consummation, and that as the result she is being injured in her property rights.) And he does not allege any facts showing wherein his instructions to his said solicitors as to

for determined, one day in July (she entered his apartment at
his solicitor), she could have leave to determine to file an answer
to the petition and such answer was filed on October 5, 1953, in which
respondent admitted the marriage at the alleged date of February 1953,
that the same contained the antenuptial agreement between the parties
and that by it the court retained jurisdiction "for the purpose of
carrying into effect the agreement." But defendant denied that
complainant's petition constituted allegations "sufficient to support
a decree for a specific performance of a contract," or that the
court "possessed equitable powers to enforce such antenuptial agree-
ment," or that the court had jurisdiction to modify such decree of
February 6th. And defendant claims that there was still pending
in the Superior Court of Cook County, case No. 48,478, a petition
wherein the petition which had been commenced by complainant
(since defendant's wife) on September 2, 1953, and that the superior
court "claims jurisdiction over the same instituted previously herein
referred to." And he urged that the divorce decree be "opened up
and vacated," and that he be allowed to file an amended answer and
a cross-bill, and for the reason, as alleged, that his former
solicitors (Mr. and Mrs. Greenberg) had violated his instructions in
allowing the divorce decree to be entered against him without a con-
test. And he claimed that he was in contempt of court and praying
that the court enter such orders that justice might be done. It will
be noticed that in his answer defendant does not deny the material
allegations of complainant's petition (in substance that defendant
wrongfully entered into the antenuptial agreement, that she in good
faith has performed or attempted to perform her part of it, that he,
although well able, has failed and refused to perform his part of it
and has prevented her commencing, and that he the result she is
being injured in her property rights.) And he does not allege any
facts showing wherein his instructions to his said solicitors as to

the trial of the divorce case were violated, or any facts showing that the decree of February 6, 1931, was obtained by fraud or improper practices.

On October 13, 1931 (before a hearing was had on complainant's said petition) defendant, by his then solicitor, Phipps, filed a petition for "leave to file a bill of review" against complainant and "such others as may, by said decree of February 6, 1931, be affected as parties defendant, for the purpose of having said decree reviewed, reversed and set aside." In the petition defendant alleged in substance that on January 29, 1931, complainant filed her amended bill in the circuit court for a divorce from him on the ground of his desertion from and after June 15, 1928; that he entered his appearance by his then solicitors and filed an answer; that there was a hearing in open court at which witnesses were heard "upon a stipulation entered into by solicitors then representing him and complainant;" that on February 6, 1931, the court granted the divorce on the ground of his desertion; that in the decree the court found that the parties had "entered into a written agreement, providing for a settlement of their property rights, which is approved by the court;" and that the court, in addition to decreeing the divorce, also decreed that "upon the consummation of the agreement the same shall constitute a complete bar of each of the parties to any claim or right of action arising out of the marital relation," and that "the court retains jurisdiction for the purpose of carrying said agreement into effect and to do equity between the parties." Defendant then stated in nine separate paragraphs various reasons why, in his opinion, said decree of February 6, 1931, should be reviewed and reversed, but no facts are alleged disclosing that there was any fraud practiced upon the court or upon defendant in procuring its entry. On the same day defendant presented to the court (Judge Trude) his said petition, together with the bill of review which he

the trial of the divorce case were violated, or who feels somehow that the decree of February 6, 1921, was obtained by fraud or improper practices.

On October 13, 1921 (before a hearing was had on complainant's sole petition) defendant, by his own solicitors, Judge, filed a petition for "leave to file a bill of review" against complainant and "such others as may, by such decree of February 6, 1921, be affected as parties defendant, for the purpose of having said decree reviewed, reversed and set aside." In the petition defendant alleges in substance that on January 29, 1921, complainant filed her amended bill in the circuit court for a divorce from him on the ground of his desertion from and after June 13, 1918; that he entered his appearance by his then solicitors and filed an answer; that there was a hearing in open court at which witnesses were heard "upon a stipulation entered into by solicitors then representing him and complainant;" that on February 6, 1921, the court granted the divorce on the ground of his desertion; that in the course the court found that the parties had "entered into a written agreement, providing for a settlement of their property rights, which is recorded by the court;" and that the court, in addition to granting the divorce, also decreed that "upon the consummation of the agreement the same shall constitute a complete bar of each of the parties to any claim or right of action arising out of the marital relations," and that "the court retains jurisdiction for the purpose of enforcing said agreement into effect and to be equally binding upon the parties." Defendant then states in his respective petitions various reasons why, in his opinion, such decree of February 6, 1921, should be reviewed and reversed, but he does not allege circumstances that have not from previously upon the court or upon defendant in procuring the decree. In the same day defendant presented to the court (Judge Cross) his said petition, together with the bill of review which he

proposed to file, but the court entered an order denying him the right to file said bill of review, and such bill is not contained in any certificate of evidence, and is, therefore, not properly before us for consideration. The clerk's record, however, discloses that on the same day (October 13th) that he filed his petition for leave to file a bill of review, complainant filed in the clerk's office a lengthy document of about 90 pages, which is entitled in the cause as a "Bill of Review."

On October 19, 1931, there was a hearing on complainant's petition of September 30th, and defendant's answer thereto, before the same judge (Judge Trude), resulting in the entry of an order that defendant appear on October 27th, and "show cause, if any he has, why he should not be punished for contempt of court for his failure to comply with the decree of this court and the orders thereof." In the order the court found that defendant then was present in open court in person and by counsel and that defendant stated that "he understood the court's order and that he waived service of a copy of the rule."

On October 27, 1931, there was a hearing before the same judge (Judge Trude) on the rule to show cause, at which time both parties and their respective counsel were present and the testimony of witnesses was heard, resulting in the court ordering that defendant "be committed to the common jail of Cook county, there to remain for a period not to exceed six (6) months, for his direct and willful contempt of this court, or until sooner purges of said contempt." In the draft order, that day filed, the court made findings in substance as follows:

> That the parties "heretofore entered into an agreement for the settlement of their property rights, which said settlement was approved by the decree heretofore entered in this cause;" that complainant has executed and delivered deeds of conveyance for such property as was required by her to be conveyed to defendant by virtue of the agreement; that she has executed and delivered to the Chicago Title & Trust Co. all of the notes, mortgages, trust deeds and other documents that she was required to do; that she has deposited the necessary moneys required of her by the settlement

proposed to file, but the court ordered an order denying him the right to file said bill of review, and such bill is not contained in any certificate of evidence, and is, therefore, not properly before us for consideration. The clerk's record, however, discloses that on the same day (October 23th) that he filed his petition for leave to file a bill of review, complainant filed in the clerk's office a lengthy document of about 20 pages, which is entitled in the cause as a "Bill of Review."

In October 17, 1921, there was a hearing on complainant's petition of October 23th, and defendants' answer thereto, before the same Judge (Judge Trabue), resulting in the entry of an order that defendant appear on October 27th, and "show cause, if any he has, why he should not be punished for contempt of court for his failure to comply with the decree of this court and the orders thereof." In the order the court found that defendant then was present in open court in person and by counsel and that defendant stated that "he understood the court's order and that he waived service of a copy of the rule."

On October 27, 1921, there was a hearing before the same Judge (Judge Trabue) on the rule to show cause, at which time both parties and their respective counsel were present and the testimony of witnesses was heard, resulting in the court entering that defendant "be committed to the common jail of Cook county, there to remain for a period not to exceed six (6) months, for his direct and willful contempt of this court, or until sooner purged of such contempt." In the court's order, that day filed, the court made findings in substance as follows:

That the parties "heretofore entered into an agreement for the settlement of their property rights, which said settlement was approved by the decree heretofore entered in this cause;" that complainant has received and retained funds of complainants for which property he was ordered by law to be compelled to deliver by virtue of the agreement that the sum remained and continued to be the property of the complainants, and that, notwithstanding, final decree and other documents that she was required to do, that she has disregarded the necessary measure required of her by the settlement

agreement to defray expenses and to pay to defendant the sum of $10,000; that she has done everything required of her to comply with the agreement; that shortly after the entry of the decree of February 6th, defendant, accompanied by his then solicitor, Charles M. Haft, appeared at the office of the Title & Trust Co., and he entered into said escrow agreement; that he executed certain deeds of conveyance to complainant, conveying to her certain properties required of him to be conveyed; that under said settlement agreement it was his duty to convey good and merchantable titles to said properties, but that he failed in this, that the titles conveyed to complainant are not good and merchantable but are subject to liens and encumbrances; that defendant dismissed his said solicitors (Haft and Hassenauer) and retained one William J. Robinson as his next solicitor of record; that said Robinson "was prevented" by defendant from completing the settlement and taking the necessary steps to clear the titles to the properties; that several months after the retention of said Robinson, defendant procured another solicitor (Phipps) to appear for him of record, and immediately thereafter caused notice to be served upon complainant that "he would not complete the said settlement," and that, as the court had no jurisdiction to enforce the same, he would "settle the matter on his own terms or not at all;" that he caused said new solicitor to file a petition, wherein he prayed for leave to file a bill of review, and presented the same to this court, together with a lengthy document purporting to be a bill of review; that after a hearing upon his petition the court denied him leave to file the document; that as to defendant's answer to complainant's petition the court finds that defendant in said answer "wholly fails to traverse or set up any defense to the allegations of said petition;" and that the court further finds that defendant, since the entry of said decree of February 6th, "has been and still is able to carry out the terms of said settlement agreement and comply with said decree, that he has willfully and contumaciously refused and failed so to do, and still in open court refuses so to do, and is in direct contempt of this court;" that since the entry of said decree he "has had full power and control over the properties required of him to be transferred and that he has been able to convey the same in accordance with the terms of said agreement;" and that defendant "has wholly failed to show any cause why he should not be punished for contempt of this court for his refusal to comply with said decree heretofore entered."

The clerk's record further discloses that on the following day (October 28, 1931) the court, on defendant's then solicitor's motion, ordered that defendant be released from the custody of the sheriff, it appearing that defendant had deposited $1,000 in cash with said clerk "as surety for Arthur Anderson, pending his appeal to the appellate court for the first district of Illinois." The record does not disclose that he perfected any such appeal, but it appears that in the following January he sued out the present writ of error from the Supreme Court, which cause thereafter was transferred to this court, as first above mentioned.

No certificate of evidence or bill of exceptions, certified by the judge, of the proceedings had on said hearing of October 27, 1931, is contained in the present record. The record, however, discloses that on November 16, 1931, there was filed in the circuit court clerk's office a so-called "Transcript of Testimony," entitled in the cause, and purporting to be a transcript of certain testimony given by said defendant under oath and statements of respective counsel. It is marked by the judge (Judge Trude) as having been "presented" to him on November 5, 1931, but it is not certified to by him in any manner, and it is, therefore, not properly a part of the present record.

Fourteen errors are assigned by defendant's solicitor, Phipps. Many of these errors are not argued by counsel in his printed brief, and, not being argued, should be considered as waived. Two of the errors assigned are that the court erred (a) in granting a decree of divorce to complainant, and (b) in approving the property settlement between the parties. A review of the present record discloses that these assignments should not be considered, and for reasons stated in said opinion of the Supreme Court (Anderson v. Anderson, 349 Ill. 40, 45), as follows (italics ours):

"The questions attempted to be raised by such assignments of error are not presented for decision by the record filed in this case, because neither the decree for divorce nor the pleadings or evidence on which it was entered, nor the property settlement agreement nor the decree approving the same, appear in the transcript of record filed in this court <u>except as they are set out in the bill of review which the defendant was denied leave to file</u>. The circuit court also refused to set aside or to modify the decree for divorce or the decree that the parties carry out the property settlement agreement, as prayed by the supplementary petition by the complainant, and the complainant has assigned no cross-errors on this record."

Two other assignments of error really amount to one, viz, (c) that the court erred in refusing defendant leave to file his bill of review. In our opinion there is no merit in the assignments. In Bushnell v. Cooper, 289 Ill. 260, 265, it is said: "Bills of

No certificate of evidence or bill of exceptions, certified by the judge, of the proceedings had on said hearing of October 27, 1921, is contained in the present record. The record, however, discloses that on November 16, 1921, there was filed in the circuit court clerk's office a so-called "transcript of testimony," entitled in the cause, and purporting to be a transcript of certain testimony given by said defendant-petitioner and statements of trial-judge counsel. It is marked by the judge (Judge Trude) as having been "presented" to him on November 8, 1921, but it is not certified to by him in any manner, and it is, therefore, not properly a part of the present record.

Numerous errors are assigned by defendant's solicitor, chiefly. Most of these errors are not argued by counsel in his printed brief, and, not being argued, should be considered as waived. Two of the errors assigned are that the court erred (a) in granting a decree of divorce to complainant, and (b) in approving the property settlement between the parties. Review of the present record discloses that these assignments should not be considered, and for reasons stated in said opinion of the supreme court (Jackson v. Jackson, 245 Ill. 69, 48), an failure (italics ours):

"The questions attempted to be raised by such assignments of error are not properly for decision by the reader that in this case, because neither the decree for divorce nor the pleadings or evidence on which it was entered, nor the property settlement agreement nor the decree approving the same, appear in the transcript of record filed in this court except as they are set out in the bill of exceptions which the defendant has denied leave to file. The circuit court also refused to set aside or to modify the decree for divorce or the decree that parties carry out the property settlement agreement, on proof by the supplementary pleadings by the complainant, and the complainant has asked to dismiss on these grounds."

The other assignments of error really amount to one, viz., (c) that the court erred in refusing defendant leave to file his bill of exceptions. In our opinion there is no merit in the assignments. In Bradwell v. Bradwell, 250 Ill. 280, 282, it is said: "Bills of

review, or bills in the nature of bills of review, are divided into three general classes: Bills for error apparent on the face of the record, bills to impeach a decree for fraud, and bills to review a decree on account of new matter or newly discovered evidence. Bills of the last class cannot be filed as a matter of right but are only allowed in the sound discretion of the court; and the same rule obtains where a bill for either of the first two causes is joined with one to review a decree on account of new matter arising since the decree was entered. * * Bills of this character will not lie until after the close of the term at which the decree was entered, and when based upon newly discovered matter must be accompanied by a showing that such fact was not discovered until after the original decree had been entered and by the exercise of reasonable diligence could not have been discovered before that time." (See, also, Schaefer v. Dunderle, 134 Ill. 577, 581; Klaus v. Klaus, 153 id. 132, 134; Harrigan v. County of Peoria, 262 id. 36, 41; Corbly v. Corbly, 304 id. 323, 327; Anderson v. Anderson, 349 id. 259, 261.) It is apparent from defendant's petition of October 13, 1931, for leave to file a bill of review, that the bill he proposed to file is one of the last named class and could only have been filed by leave of court first obtained. And it is equally apparent that the court did not abuse its discretion in denying him leave to file the proposed bill. He made no proper showing. In the Corbly case it is said that the allowance of the filing of such a bill of review "is not a matter of right in the party, but rests in the sound discretion of the court, to be exercised cautiously and sparingly, and only under circumstances that demonstrate it to be indispensable to the merits and justice of the cause." In the Klaus case it is said: "The true rule would seem to be that unless there has been an abuse of the fair discretionary power with which the circuit court has been invested in the matter of such applications its decision should not be disturbed."

review, or bills in the nature of bills of review, are divided into three general classes: Bills for cause apparent on the face of the record, bills to impeach a decree for fraud, and bills to review a decree on account of new matter or newly discovered evidence. Bills of the first class cannot be filed as a matter of right but are only allowed in the sound discretion of the court; and the same rule obtains where a bill for either of the first two causes is joined with one to review a decree on account of new matter arising since the decree was entered. . . . Bills of this character will not lie until after the close of the term at which the decree was entered, and when based upon newly discovered evidence must be accompanied by a showing that such fact was not discovered until after the original decree had been entered and by the exercise of reasonable diligence could not have been discovered before that time." (See also, Schaefer v. Tonnelier, 324 Ill. 277, 282; Ladd v. Ellwood, 193 Ill. 388, 394; Harrison v. County of Fayette, 88 Ill. 351; Dodge v. Cotton, 204 Ill. 518, 527; Anderson v. Anderson, 149 Ill. 288, 291.) It is apparent from defendants's petition of October 13, 1952, for leave to file a bill of review, that the bill is proposed to file is one of the last resort claims and could only have been filed by leave of court first obtained. And it is equally apparent that the court did not abuse its discretion in refusing him leave to file the proposed bill. He made no proper showing. In the petition sued in it is said that the allegations of the filing of such a bill of review "is not a matter of right in the party, but rests in the sound discretion of the court, to be exercised cautiously and sparingly, and only upon discovery of new evidence, if it be of importance in the merits and justice of the cause." In the Ladd case it is said: "The true rule would seem to be that unless there has been an abuse of the full discretionary power with which the chancery court has been invested in the matter of such applications the decision should not be disturbed."

And equally without merit, in our opinion, is another assignment of error (d) that the court erred in finding defendant guilty of contempt for failure to comply with the terms of the decree concerning the property-settlement agreement. The allegations of fact in complainant's verified supplementary petition of September 30, 1931, were not denied by defendant in his answer to the petition. Those allegations showed prima facie that he was in contempt of court for having deliberately refused, although well able, to carry out the settlement agreement, which he had advisedly entered into and joined with complainant in getting the court to approve the same in said decree. Furthermore, in the absence of a certificate of evidence or bill of exceptions showing what occurred on the hearing of the rule to show cause, we must presume that the findings of the court, as contained in said commitment order of October 27, 1931, above set forth, were sufficiently sustained by evidence adduced at said hearing. Much of defendant's counsel's argument, as to why said last mentioned order is erroneous, has as its basis a certain prior litigated partition suit, commenced in the superior court by complainant (then defendant's wife) against him on September 2, 1928, in which suit a decree subsequently was rendered, and on appeal to the Supreme Court was affirmed in part and reversed in part and remanded with directions. (Anderson v. Anderson, 339 Ill. 400, 414.) We cannot see what proper bearing the partition litigation has upon the present divorce litigation. If it has any it should have been made to appear, and it has not been made to appear in the present record.

Finding no reversible error in the record, the said divorce decree of February 6, 1931, the order of October 13, 1931, denying defendant leave to file a bill of review, and the contempt order of October 27, 1931, adjudging defendant guilty of willful contempt of court and sentencing him to jail for a period not to exceed 6 months, or until sooner purged of the contempt, are all affirmed.

AFFIRMED.

Scanlan, P. J., concurs.

and equally without merit, in our opinion, in another respect of error (d) that the court erred in finding defendant guilty of contempt for failure to comply with the terms of the decree requiring the plaintiff-appellant's [illegible]. The allegations of fact in complainant's verified supplementary petition of September 30, 1953, were not denied by defendants in their answer to the petition. These allegations showed prima facie that he was in contempt of court for having deliberately refused, although well able, to comply and the additional payments, which he had arbitrarily reduced into and joined with complainant in getting the court to approve the same in said decree. Furthermore, in the absence of a certificate of evidence or bill of exceptions showing what occurred on the hearing of the petition in show cause, we must presume that the findings of the court, as contained in said commitment order of October 27, 1953, above set forth, were sufficiently supported by evidence adduced at said hearing. Much of defendant's counsel's argument, as to why said last mentioned order is erroneous, has as its basis a strange view injected particular merit, commenced in the [illegible] court by complainant and (then defendant's wife) against him on September 8, 1953, in which suit a decree subsequently was rendered, and on appeal to the [illegible] Court was affirmed in part and reversed in part and remanded with directions. (Anderson v. Anderson, 4 Ill. App. 2d, [illegible]) In order to see what proper bearing the pertinent litigation has upon the present appeal litigation, it is but say it should have been made to appear, and it has not been made to appear in the present record,

Finding no reversible error in the record, the said decree dated at Chicago, January 4, 1954, the order of October 27, 1953, hereinbefore referred to, and the order of October 27, 1953, [illegible] contempt proceeding, are affirmed.

AFFIRMED.

Lewis, P. J., concurs.

36024

NICK DeANGELIS,
Plaintiff in Error,
"
v.
CLARENCE H. BAN VANUTI,
Defendant in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE SNIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries received by plaintiff in an automobile accident on the evening of October 13, 1929, there was a trial before a jury in November, 1931, resulting in a verdict finding defendant not guilty. Judgment upon the verdict was entered against plaintiff for costs, and he seeks by the present writ of error to reverse the judgment. Defendant has not filed a brief in this court.

On the trial plaintiff and three witnesses called by him gave testimony as to the happening of the accident. Defendant gave his version thereof, and also called three witnesses who testified as to observations made upon their arrival at the scene of the accident after it had happened. From the testimony of plaintiff and two of his witnesses the following facts appear in substance: A much travelled public highway, about 50 feet wide and known as Milwaukee avenue, runs in a northwesterly and southeasterly direction. About three miles north of Dempster street (an east and west highway) is an east and west road, known as Central road, which crosses Milwaukee avenue. About 7:30 o'clock on the evening in question plaintiff was driving his Ford automobile southeasterly in Milwaukee avenue, when, because of a flat tire, he was compelled to stop, near Central road, to put a spare tire

[illegible]

[illegible] INJUNCTION.

Plaintiff in Error,

v.

CHARLES E. [illegible] VANCE,

Defendants in Error.

MOTION TO DISMISS COURT'S

[illegible] COURT.

MR. JUSTICE BRANDEIS MILTONED THE OPINION OF THE COURT.

In an action for damages for personal injuries received by plaintiff in an automobile accident on the evening of October 19, 1920, there was a trial before a jury in November, 1921, resulting in a verdict finding defendant not guilty. Judgment upon the verdict was entered against plaintiff for costs, and he seeks by the present writ of error to reverse the judgment. Defendant has not filed a brief in this court.

On the trial plaintiff and three witnesses called by him gave testimony as to the happening of the accident. Defendant gave his version thereof, and also called three witnesses who testified as to observations made upon their arrival at the scene of the accident after it had happened. From the testimony of plaintiff and two of his witnesses the following facts appear in substance: A much travelled public highway, about 10 feet wide and known as Milwaukee avenue, runs in a northwesterly and southeasterly direction. Just there exists north of Jackson street (or rut and mud highway) is an east and west road, known as Central road, which crosses Milwaukee avenue. About 7:30 o'clock on the evening in question plaintiff was driving his Ford automobile southeasterly in Milwaukee avenue, when, because of a flat tire, he was compelled to stop, near Central road, to put a spare tire

on the left rear wheel of his car. At this point the highway was sufficiently wide to allow four lanes of traffic, two north and two south, and plaintiff had been travelling on the concrete pavement in the lane farthest to the west. Immediately to the west of the pavement was a dirt "shoulder," about 4 or 5 feet wide, and still farther to the west was a shallow ditch. The district was open country. There was a slight bend in the road just north of where plaintiff stopped. He proceeded to drive his car almost entirely off the pavement and stopped, headed southerly. Only the left rear wheel remained upon the pavement. It was nearly dark but objects over 200 feet away could be seen. The lights on plaintiff's car, including the tail-light, were burning. With the assistance of his son and his nephew, who had been passengers in the car, plaintiff raised said left rear wheel by means of a jack resting upon the pavement near its edge. Having removed the old tire plaintiff was in the act of putting on the spare tire. He was standing on the pavement to the east of and close to the car, in a stooping position facing it. His son was standing on the east running board and was so directing the rays of the "spot light" that they were shining on plaintiff and on the wheel and tire, and toward the north. Suddenly, and without any warning, defendant's Essex automobile, being driven by him southerly in the most westerly lane of the highway, collided with a rear portion of plaintiff's car and with plaintiff, causing him to be violently thrown down upon the pavement, breaking his left leg and both arms and bruising him. Plaintiff's son also sustained injuries, and plaintiff's car was shoved forward about ten feet, and when it stopped it was partially on the dirt shoulder of the road and partially in the ditch. After the accident, an ambulance having been called, plaintiff was taken to St. Francis Hospital in Evanston,

on the left rear wheel of his car. At this point the highway was sufficiently wide to allow four lanes of traffic, two north and two south, and plaintiff had been travelling on the concrete pavement in the lane farthest to the west. Immediately to the west of the pavement was a dirt "shoulder," about 4 or 5 feet wide, and still farther to the west was a shallow ditch. The district was open country. There was a slight bend in the road just north of where plaintiff stopped. He proceeded to drive his car almost entirely off the pavement and stopped, heated momentarily. Only the left rear wheel remained upon the pavement. It was nearly dark but objects over 300 feet away could be seen. The lights on plaintiff's car, including the tail-lights, were burning. The defendants of his son and his nephew, who had been promenadeing in the car, plaintiff noticed that left rear wheel by means of a jack resting upon the pavement near its edge. During removal the jack slipped and plaintiff was in the act of putting on the spare tire. He was standing on the pavement to the west of and close to the car, in a stooping position facing it. His son was standing on the east running board and was in directing the rays of the "spot light" that they were shining on plaintiff and on the wheel and tire, and toward the north. Suddenly, and without any warning, defendant's Ford automobile, being driven by him southerly in the east portion of the highway, collided with a rear portion of plaintiff's car and with plaintiff, causing him to be violently thrown over upon the pavement, breaking his left leg and cut open and bruising him. Plaintiff's son also sustained injuries, and plaintiff's car was damaged about $40 Ford, and that is where it stopped in the particular on the left shoulder of the road and partially in the ditch. After the accident, no witnesses having been called, plaintiff was taken in the Ford automobile to Lawrence,

where he received medical treatment and hospital care. His paid hospital and physicians' bills amounted to about $700. He was a tailor by trade, running his own shop in Chicago, and usually had earned about $50 a week at his work. It was about a year before he could resume his usual work, during which time his shop was closed, and he claimed that even up to the time of the trial he occasionally suffered pain in his left leg, resulting from the fracture.

Plaintiff's other witness, Henry Oklare, just prior to the accident, was driving his automobile southeasterly in the most westerly lane of the highway, and at a speed of about 35 miles an hour. His testimony was in substance that he noticed an automobile (which he afterwards learned was defendant's) about 100 feet ahead of him, travelling in the same lane, in the same direction, and at about the same rate of speed as he was running; that neither the north or south traffic on the road was particularly heavy at the time; that he also noticed a slight bend in the road towards the west; that he painly saw another automobile (plaintiff's) standing on the right (west) edge of the road and that several persons were standing to the east of the automobile and doing some work upon it; and that shortly afterwards he saw the collision, stopped and alighted from his car, rendered some assistance to plaintiff and remained at the scene of the accident until the ambulance arrived. The witness was a disinterested one, not acquainted with the parties.

Defendant, employed as a clerk for an express company, was his only witness as to the happening of the accident. He testified that his wife was with him in his car at the time; that they were returning home from Antioch; that it was "completely dark;" that he was driving southerly in the west traffic lane and at a speed of about 30 miles an hour; that he was "about 15 feet behind" another car going southerly at about the same rate of speed; that suddenly "this

where he received medical treatment and hospital care. His pay hospital and physicians' bills amounted to about $700. He was a tailor by trade, running his own shop in Chicago, and usually had earned about $50 a week at his work. It was about a year before he could resume his usual work, during which time his shop was closed, and he claimed that even up to the time of the trial he occasionally suffered pain in his left leg, resulting from the injuries.

Plaintiff's other witness, Henry Kleber, last prior to the accident, was driving his automobile southwesterly in the main westbound lane of the highway, and at a speed of about 30 miles an hour. His testimony was in substance that he noticed an automobile (which he afterwards learned was plaintiff's) about 100 feet ahead of him, travelling in the same lane, in the same direction, and at about the same rate of speed as he was running; that neither the main or auxiliary wheels on the car prior to the collision showed signs of skidding; that he also noticed a single road in the road between the wheels; that he paid no more attention to plaintiff's automobile on the right (west) edge of the road and that several persons were standing to the side of the automobile and talk with some work upon it and that shortly afterwards he saw the collision, seeing the injured man, his son, removed from automobile to plaintiff and taken to the house of the defendant until the ambulance arrived. The witness was a disinterested one, not acquainted with the parties.

Defendant, employed as a clerk for an engineering company, was his only witness as to the happening of the accident. He testified that his wife was with him in his car at the time; that they were returning home from Galesburg; that it was "comparatively dark"; that he was driving southerly in the west bound lane and at a speed of about 30 miles an hour; that he was "about two hundred feet" another car going southerly at about the same rate of speed; that suddenly "this

car swerved to the left into the other south traffic lane, and I then saw for the first time by my lights the parked Angelis' car; I attempted to swerve my car to the left and follow in the same direction as the car ahead of me had done, but just as I attempted to do so another car came by me at 40 miles an hour * " and I immediately swung back and applied my brakes;" that as the Angelis' car first came into my vision "there was a man standing behind it and another man standing to the left of it;" that Angelis was "caught between the two cars;" that when the collision occurred the Angelis car was "pushed ahead, five to ten feet;" and that the witness did not see the Angelis car until he was "18 or 20 feet away from it;" and not until the automobile, which was immediately ahead of him and "directly in my line of vision," had swerved to the left.

After considering all the facts and circumstances in evidence, we are of the opinion that the jury's verdict for defendant is manifestly against the weight of the evidence, both on the question of defendant's negligence and plaintiff's claimed contributory negligence in parking his car at the time and place and for the purpose shown, and that it is in the interest of justice that there should be another trial of the cause. We think that it sufficiently appears that defendant was guilty of negligence in not keeping such a lookout ahead as would have enabled him to see plaintiff's parked car before he did. If it be true, as claimed, that defendant could not see plaintiff's car before he did because the other car travelling 18 feet ahead of him obstructed his vision, we think he is still chargeable with negligence in that his car was travelling too close to that other car, especially when the admitted speed of his car (30 miles an hour) is considered. And we fail to see, under all the facts and circumstances, how plaintiff can be considered to have been contributorily negligent, as claimed, in parking his car where he did (i.e., on the very edge of the road) for the purpose

car swerved to the left into the other south bound traffic lane, and I saw as for the first time by my sister the white Impala car. My I attempted to swerve my car to the left and deliver in the same direction as the car ahead of me had done, but just as I attempted to do so another car came by me at 60 miles an hour - " and I immediately among bump and applied my brakes, that as the Impala car first came into my vision "there was a man standing behind it and another man standing to the left of it" that Impala man "swerve between the car away, and then the motorist swerved the Impala car was "passed ahead, like to the traffic was that the ele- ment his car was the Impala car until he was "21 or 22 feet away from it" and not until the motorcycle, which was immediately ahead of him and "directly in my line of vision", had swerved to the left.

After considering all the facts and circumstances in evi- dence, we are of the opinion that the jury's verdict for defendant is manifestly against the weight of the evidence, both as to the question of defendant's negligence and plaintiff's claimed contributory negligence in parking his car at the time and place and for the purpose shown, and that it is in the interest of justice that there should be another trial of the cause. - Cases that is sufficiently apparent that defendant was guilty of negligence in not keeping such a personal check as would have enabled him to see plaintiff's parked car before he did. If it be true, as claimed, that defendant could not see plaintiff's car before he did because the other car travelling 35 feet ahead of him obscured his vision, as claim is still chargeable with negligence in that his car was travelling too close to that other car, especially when the limited speed of the car (40 miles an hour) is considered. And as fail to see, under all the facts and circumstances, for plaintiff can be considered to have been contributorily negligent, as claimed, in parking his car where he did (i.e., on the north edge of the road) for the purpose

of putting on another tire. In 1 Berry on Automobiles, p. 238, sec. 255, it is said: "It is held that a motorist is not a trespasser upon a highway because he stops there temporarily to repair his machine. At such time he is entitled to the rights of a traveller. He may be negligent in stopping in a dark place without showing lights, or just around the end of a curve in the highway which obscures him from other travellers approaching on the same side of the highway. He is not necessarily negligent in failing to watch continuously for other vehicles. He may rely to some extent on the exercise of due care by the drivers of other machines." In the present case it appears from the clear preponderance of the evidence that at the time of the collision the lights on plaintiff's car were burning, and that the slight bend in the road to the north of where his car was parked assisted rather than prevented drivers of other cars, going southerly, in seeing the parked car. (See, also, Collins v. McMullin, 205 Ill. App. 430, 432-3; Reynolds v. Murphy, 241 Mass. 225, 227-3.)

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, P. J., concurs.

of putting on another tire. In a decay on [illegible], p. 722, [illegible] 62d, 17 in [illegible] "It is held that a motorist is not a trespasser upon a highway because he uses there temporarily to repair his machine. At such time he is entitled to the rights of a traveller. He may be negligent in stopping in a dark place without showing lights, or just around the end of a curve in the highway which obscures the view therefrom (preventing an the same side of the highway. He is not necessarily negligent in failing to hold continuously for other vehicles. He may rely to some extent on the exercise of due care by the drivers of other machines." In the present case it appears from the plaintiff's testimony of the evidence that at the time of the collision the lights on plaintiff's car were burning, and that the lights were in the road to the north of where his car was parked rendered rather than prevented drivers of other cars, going northerly, to avoid the parked car. (See, also, [illegible] v. [illegible], [illegible] 490, 492, 232-3; [illegible] v. [illegible], [illegible] [illegible], 217-8.)

The judgment is reversed and the [illegible] remanded.

[illegible]

[illegible], J., absent.

73 7

35448

AVERY BRUNDAGE,
Appellant,

v.

SOUTH PARK COMMISSIONERS,
a body politic, incorporated,
Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

269 I.A. 654

MR. JUSTICE SHIDLEY DELIVERED THE OPINION OF THE COURT.

On June 16, 1931, in an action in assumpsit for damages for breach of a written contract, upon a trial without a jury, the court entered a finding and judgment against defendant for $1,000. From the judgment plaintiff prosecutes the present appeal.

The action was commenced on April 23, 1930. Plaintiff's amended declaration consists of a special count and the common counts, to which defendant filed pleas of the general issue. In the special count plaintiff alleges:

> That on August 14, 1924, defendant entered into a written contract with plaintiff, by the terms of which "plaintiff agreed to furnish all the labor and material required for the complete construction of the work on the South Park Boulevard Viaduct at East 43rd street and the Illinois Central R. R. Co.'s right of way, specifically referred to in the contract as:" (Here is described six "items" of work) "which said work, with the exception of the sidewalk slabs, was to be completed on or before March 1, 1925, and said sidewalk slabs were to be completed on or before April 1, 1925;" that for the performance of the contract plaintiff was to be paid "the sum of $866,380, with such additions or deductions therefrom, at unit prices specified in said contract, as might result from additions to or deductions from said work;" that the contract further provided that "certain buildings occupying a part of the site of the proposed viaduct would be wrecked by defendant not later than August 1, 1924, and said site made available to plaintiff for the carrying on of the work contemplated by the contract," and that "foundations for certain of the abutments for the viaduct would be completed by defendant, pursuant to separate contracts made by it with other contractors, by September 1, 1924, certain steel spans erected by defendant complete by October 1, 1924, and the foundations for the east approach of the viaduct completed by defendant by October 1, 1924."

[illegible]

[illegible]

[illegible]

That defendant, in violation and disregard of its obligations under the contract, "failed to complete the wrecking of said buildings occupying a portion of the site of the proposed viaduct until, to-wit, September 14, 1924" (a delay as alleged of 1-1/2 months), "and failed to complete the construction of said abutments and steelwork until, to-wit, January 15, 1925" (delays as alleged of 4-1/2 and 3-1/2 months respectively), "whereby plaintiff was greatly delayed in his performance of the work" under the contract; that plaintiff furnished the material and completed the work required by the contract and to defendant's satisfaction, together with certain additional work ordered, and defendant "has paid plaintiff therefor;" and that by reason of said delays caused by defendant's said breaches, "the cost to plaintiff of performing and completing said contract was greatly enhanced and increased, - all to plaintiff's great loss and damage in the sum of $100,000," etc.

The record discloses that on April 21, 1931, on defendant's motion, the court ordered plaintiff to file a bill of particulars, which thereafter was filed and is contained in the bill of exceptions. It is a lengthy instrument, divided into 8 paragraphs and containing figures and words setting forth the several claims and the bases therefor. The aggregate stated sum for all claims is $96,223.76, and the substance of the several claims is as follows:

1. "Due to the failure of defendant to deliver possession of the site for said 23rd street viaduct for approximately four months after the date on which plaintiff was ready to begin the construction of the viaduct, plaintiff was obliged to incur and did incur the following direct expenses for job supervision, rental of equipment and overhead expenses for said period of four months:"

Job supervision (wages and insurance)	$12,439.	
Rental of equipment (itemized)	6,100	
Overhead expenses, at rate of 3% per year on $600,000, and rent and attrition on small tools	7,400	$25,939.00

2. Due to said delay in turning over the site and the delay of defendant's other contractors in constructing foundations and steelwork, it became necessary for plaintiff to prosecute his work "during the winter months," and thereby increased his expense because of the necessary use of additional lumber for the concrete forms, to the net amount of 22,620.00

3. Due to said delays, plaintiff suffered a loss "in efficiency of plaintiff's working and supervising force," because (a) said force, being ready, had to be temporarily laid off, and (b) when it resumed work, it was obliged to work "under winter conditions." And its efficiency "was reduced at least 10 per cent." And, as plaintiff's total payroll was $241,000, the 10 per cent loss incurred is 24,100.00

Carried forward $72,659.00

Such arrangements, in violation and disregard of its obligations under the contract, "failed to complete the wrecking of said buildings comprising a portion of the site of the proposed viaduct until, so-called, in 1904." [a delay as alleged of 1-1/2 months]. "and failed to complete the construction of said abutments and abutment walls, in-etc. [amount 1]. 1904" [delays as alleged of 6-1/2 and 2-1/2 months respectively]. "thereby plaintiff was greatly delayed in his performance of the work; after the contract was completed that plaintiff furnished the materials and completed the work required by the contract and to defendant's satisfaction, together with certain additional work ordered, and instructed "the work satisfactorily executed" was that by reason of said delays caused by defendant's acts hereinbefore, "the work is plaintiff of performing and completing said contract was greatly embarrassed and increased, - all to plaintiff's great loss and damage in the sum of $100,000." etc.

The second discloses that on April 21, 1903, an defendant's

action, the court ordered plaintiff to file a bill of particulars, which

Therefore was filed and is contained in the bill of exceptions. It is

a lengthy instrument, divided into 8 paragraphs and containing figures

and words, adding forth the several claims and the damage therefor. The

aggregate demand sum for all claims is $98,000.76, and the subtotals of

the several claims is as follows:

1. "due to the failure of defendant to deliver possession of the site for said first wrecked viaduct for approximately four months after the date on which plaintiff was ready to begin the construction of the viaduct, plaintiff was obliged to hire and die large the following direct expenses for job superviction, rental of equipment and overhead expenses for said period of four months"

Job supervision (wages and insurance)	$22,[illegible]
Rental of equipment (estimated)	6,[illegible]
Overhead expenses, at rate of 3% per year on $800,000, and rent and utilities on small tools	
Total	$[illegible]

2. Due to paid delay in turning over the site and the delay of defendant's other contractors in constructing foundations and abutments, it became necessary for plaintiff to prosecute his work "during the winter months," and thereby incurred his expense because of the necessary use of additional labor for the heating [illegible] in the sum amount of $[illegible]

3. Due to such delays, plaintiff suffered a loss "in utilization of plaintiff's working and supervising force." Because (a) such force, being [illegible], had to be temporarily laid off, and (b) when it resumed work, it was obliged to work "under winter conditions," and the efficiency "was reduced at least 25 per cent." Ind. on plaintiff's total payroll was [illegible], the 25 per cent loss increased its

Carried forward $[illegible]

Brought forward $72,659.00

4. Because of said delays, it became impossible for plaintiff to complete the viaduct in time to permit the opening of the drive in the summer of 1925, "without working from both ends of the viaduct," and this "required the installation of a separate plant at the east end." The "orderly and economical plan of procedure was to pour the entire concrete from the large concrete plant already erected by plaintiff on the South Parkway," but, because of the necessity of operating from both ends of the viaduct, there was the additional cost "of building a concrete tower and chuting system, installing concrete mixers, hoists, etc., and wrecking same, at said east end," and for certain rent for 2 months, all amounting to $2425.00

And the additional expense for additional foremen, etc., required for a separate gang, for 9 weeks, of 1665.00

And, in order to make the east end of the viaduct accessible to trucks, plaintiff was forced to build and maintain temporary driveways at a cost of 1500.00

And, due to the longer haul, he was forced to pay more for materials delivered to the east end of the viaduct, consisting of sand and stone, cement and lumber, amounting (itemized) to 3300.00

And, "due to the awkard layout," concrete was poured "at an additional cost to plaintiff of $1 per cubic yard over what it would have cost had he been able to use his more efficient and larger plant on the South Parkway, and 2700 cubic yards were placed at said east end" at the additional cost of 2700.00

And, "all of the form work on the east abutment and each approach, involving 250,000 feet of lumber, was handled as a separate operation, and, because of the limited working space, the long carry of the lumber from the nearest available delivery point to the point of erection, and the expense of starting a new base of operations with a loss of time and efficiency involved thereby, the work at said east end cost $20 per thousand more than if the work could have been prosecuted in accordance with the original schedule, operating in an orderly fashion from the west end." This additional expense amounted to 5000.00 $16,590.00

5. Because of said delays, also, "part of the work under the contract could not be completed until after June 1, 1925, at which time new wage scales went into effect," causing an additional expense for labor and insurance, plus a 10% commission, of 2,091.16

Carried forward $91,340.16

Stewart Forward

1. Because of such delays, it becomes increasingly far plausible to compute the stamps in time to permit the crossing of the notes in the amount of 2[illegible]. Without reading from such sets of the stamps," and late "reminded the impossibility of a separate point on the road and." The "practicly and experimental plan of procedures was to part the making separate from the large commercial plants already arranged by plaintiff on the Jersey Railway." but, because of the necessity of separating from both such of the vehicles, there was the additional cost "of building a concrete barrer and chutes across, installing separate mixers, hoists, etc., and wrecking some of old road and." The jur actually cost per 2 months all according to

and the building expense for additional foremen, etc., required for a separate plant, for 2 months, of 1[illegible]

Ind. In order to meet the suit and of the vehicles accessible to stress, plaintiff was forced to build and maintain temporary delivery of a car of

Ind. due to the longer haul, he was forced to pay more for materials delivered to the east end of the stacks, consisting of sand and stone, brought not lower, consisting (limestone) to

Ind. "due to the reduced layout," observes one witness "is an additional cost to plaintiff of 1[illegible] per cubic yard over what it would have cost if the plant could be kept side by side with other structures and larger plant on the South Jersey, and also cubic yards were placed at will over that" is the additional cost of

Ind. "all of the time said on the part account and with expense, involving the cost of labor, was handled as a separate operation, and because of the limited volume space, the 10 C yards of the lower line the minimum available output to the yard of mixers, and the expense of erecting a new hoist or operations with a lower at time and attendant increased labor, the cost of the work and not for the increased cost since it the work cost have been proportion in accordance with the original schedule, operating in an orderly fashion from one end to.' This additional expense accrued to

Ind. 1. Because of such delays, since "part of the cost cause the mixing could not be completed until after the 1[illegible] of stone than can make cubic yard cost-after," resulting in additional expense for labor and increases plus a 10% reduction, of

Stewart Forward

Brought forward		$91,340.16
6. "Because of defendant's delay in wrecking the building occupied by the Chickering Piano Co. and the delay of the I. C. Railroad in finishing the ramp to 22nd street, part of the work under the contract could not be completed until the winter of 1925-6." And the extra cost to plaintiff, "due to completing said work during said winter months" was as follows:		
Labor for ice and snow removal and for salamander and tarpaulin work, including insurance and a 10% commission, amounting to	$937.43	
Tarpaulin and salamander equipment (net)	421.00	1,358.43
7. "Due to the fact that the ornamental concrete and benedict stone were not ready at the time fixed in the contract and specifications, plaintiff could not complete the cove in connection with the sidewalks, with the result that part of the sidewalks had to be omitted, and plaintiff was forced to return and finish the cove and the balance of the work at a later period, and after his equipment had been removed from the job," causing an additional expense, for "1925 lineal feet at $1, plus 10%, of		2,117.00
8. "Due to a change made in the jointing of the sidewalks, as shown on drawing H-29-2849, which change was authorized by defendant's engineers," plaintiff is entitled to receive for said extra work, (46,839 square feet at 3 cents) the sum of		1,405.17
Total		$96,220.76

On the trial plaintiff was the principal witness called in his behalf. He testified at great length. His only other witness (called as an expert) was Arthur H. Wells, the general manager of a firm of building contractors in Chicago. Plaintiff introduced in evidence the original contract, also a "Supplemental Agreement," signed by the parties and dated January 27, 1925, various letters between the parties, and photographs and blue print drawings. Neither the plans nor specifications for the work were introduced. Defendant's principal witness was Linn White, chief engineer of defendant in charge for it of the construction of the viaduct and its

Freight Forward [illegible]

5. "Damage of defendant's ship in working the building occupied by the [illegible] Flow Co. and the delay of the [illegible] in finishing the ramp in that street, prior to the work under the contract would not be completed until the winter of 1907-8." The [illegible] must be plaintiff's "due to complaints made about work during said winter months" [illegible]

Labor for [illegible] and for [illegible] and a 10% commission, amounting to [illegible] $107.63

Carpentry and miscellaneous equipment (Doe) [illegible] $1,[illegible]

7. "Due to the fact that the structural concrete and overhead work were not ready at the time fixed in the contract and specifications, plaintiff could not complete the work in accordance with the schedule, with the result that part of the [illegible] had to be [illegible], and plaintiff was forced to return and finish the work and the balance of the work at a later period." [illegible] $3,127.00

6. "Due to a change made in the location of the elevator, as shown on drawing [illegible], which change was authorized by defendant's engineers," plaintiff is entitled to [illegible] for [illegible] work. (46,[illegible] square feet at 3 cents) the sum of $1,[illegible]

Total $[illegible]

On the final plaintiff was the prevailing witness within in his behalf. Mr. Hartfield of Grand Jungle. His only other witness (being an accountant) was [illegible] Hale, the general manager of a firm of building contractors in Chicago. Plaintiff introduced in evidence the original contract, also a "Supplemental Agreement," signed by the parties one [illegible] 15, 1907, various letters between the parties, and photographs and blue print drawings. Subject the plans for specifications for the work were introduced. Defendant's principal witness was Elmer Tuttle, chief engineer of defendant in charge for it of the construction of the elevator and its

employee for about 26 years. M. H. Lovewell, an assistant engineer in its employ for 32 years, also testified for defendant, and other letters and documents were introduced by it. Portions of the original contract of August 14, 1924, in which plaintiff is designated as the "Contractor" and defendant as the "Commissioners," are as follows (italics ours):

"Article 1. The Contractor agrees to furnish all the labor and material required for the complete construction of the work (included in certain named 'Items'), all in accordance with the drawings and specifications, * * and to do to the satisfaction of the engineers of the Commissioners everything required of him by the 'General Conditions,' specifications or drawings."

"Article 2. The Contractor agrees to complete * * the entire work * *, with the exception of the sidewalk slabs, on or before March 1, 1925, and to complete the sidewalk slabs on or before April 1, 1925."

"Article 3. Subject to additions and deductions as provided in the 'General Conditions of the Contract,' the Commissioners agree to pay to the Contractor for the performance of the contract the sum of $566,300; and further agree that for work added or omitted, by reason of any changes ordered or approved by the Commissioners, the following unit prices shall be used for computing additions to or deductions from the contract sum." (Here follows a lengthy table of unit prices.) "Payments shall be made in current funds, but only upon certificates signed by the engineer and countersigned by the General Superintendent, * *."

"Article 4. The Contractor and the Commissioners agree that the 'General Conditions of the Contract' (as set forth in the following numbered articles), the specifications and drawings * * are, together with this agreement, the documents forming the contract, and that said 'general conditions of the contract,' specifications and drawings are to be considered, in their entirety, as a part of this contract; * * ."

"Article 6. Execution, Correlation and Intent of Documents. * * The contract documents are complementary, and what is called for by any one of them shall be as binding as if called for by all of them. The intention of the documents is to include <u>all</u> labor and materials reasonably necessary for the proper execution of the work. * *"

"Article 24. Changes in the Work. The Commissioners, without invalidating the contract, may make changes by altering, adding to or deducting from the work, * the contract sum being adjusted accordingly. All such work shall be executed under the conditions of the original contract, except that any claim for extension of time caused thereby shall be adjusted at the time of ordering such change. * *"

"Article 34. Delays. If the Contractor be delayed in the completion of the work by any act or neglect of the Commissioners, * * or by any other contractor employed by the Commissioners, * * or by strikes * * unavoidable casualties, or any cause beyond the

employee for about 20 years. Mr. H. Lovewell, an assistant engineer in the supply for 22 years, also testified for defendants, and other letters and documents were introduced by it. Portions of the original contract of August 16, 1926, in which plaintiff is designated as the "Contractor" and defendants as the "Commissioners," are as follows:

(Italics mine).

"Article 3. The Contractor agrees to furnish all the labor and material required for the complete construction of the sewer line in certain areas known 'items', all in accordance with the plans, specifications, ", and to do so the satisfaction of the officers of the Commissioners employing engineer of the by the 'General Conditions', specifications or drawings."

"Article 5. The Contractor agrees to complete * * the entire work " * with the exception of the sidewalk slabs, on or before March 1, 1928, and to complete the sidewalk slabs on or before April 1, 1928."

"Article 9. Subject to additions and deductions as provided in the 'General Conditions of the Contract', the Commissioners agree to pay to the Contractor for the performance of the contract the sum of $[illegible]; but further agree that if any work shall be omitted, by reason of any changes ordered or approved by the Commissioners, the following unit prices shall be used for computing additions to or deductions from the contract sum." (Here follows a lengthy table of unit prices.) "Payments shall be made to contract funds, but only upon certificates signed by the Engineer and countersigned by the General Superintendent. * * *."

"Article 4. The Contractor and the Commissioners agree that the 'General Conditions of the Contract' (as set forth in the following numbered articles), the specifications and drawings - * * - together with this agreement, the Contract Bond and the Proposal, and that said 'General Conditions of the Contract', specifications and drawings are to be considered, in every respect, as a part of this agreement. * * *."

"Article 8. Insurance, Certificates and Checks of Commission. * * The contract document are complete, and that is noting for by all for any one or more shall be an binding on it noting for by all of them. The inclusion of the commission is in limited all labor and materials reasonably necessary for the proper execution of the work. * *."

"Article 14. Changes in the Work. The Commissioners, without invalidating the contract, may make changes by altering, adding to or deducting from the work. - The contract sum being adjusted accordingly. All work work shall be executed under the conditions of the original contract, except that any claim for additions of time caused thereby shall be adjusted at the time of ordering such change. * *."

"Article 16. Inspection. If the Contractor be delayed in the completion of the work by any act or default of the Commissioners, * * or by any other contractor employed by the Commissioners, * * or by strikes - * unavoidable casualties, or any cause beyond the

Contractor's control, * * then the time of completion shall be extended for such reasonable time as the Engineer may decide. * *."

"Article 47. Delays. Any delay caused by the Commissioners shall entitle the Contractor for the work under this specification to an extension of time within which to complete the work equal to the delay so occasioned. Any extension or extensions of time within which to complete the work, which may be given by the Commissioners to the Contractor on account of delay suffered by the Contractor, shall be accepted by the Contractor as full compensation for any and all damages or losses which the Contractor may suffer or may have suffered by reason of or on account of such delay."

From letters introduced by plaintiff upon the trial it appears that the original contract was not actually signed by plaintiff until the latter part of September, 1904, and that shortly prior thereto Article 47 was under consideration. On September 9, 1904, plaintiff wrote defendant, "for the attention of Mr. Linn White," that before plaintiff signed the contract he desired certain corrections to be made therein. After referring to portions of the contract (not here material) he wrote:

"In connection with Article 47 of the contract, which provides in the second sentence that any extension of time granted by the Commissioners shall be accepted by the contractor as full compensation for any damages or losses which the contractor may have suffered on account of such delay, we desire to call the attention of the Commissioners to the fact that such a provision is manifestly unfair. We might cite a dozen instances where the strict application of this paragraph would be disastrous to any contractor, and we do not believe that the Commissioners on reflection will insist on its inclusion in a contract for public work. * * Please let us hear from you."

On September 23, 1904, White, as chief engineer of defendant, replied in substance that the matters therein mentioned had fully been discussed with defendant's attorney, that as to Article 47 the attorney "does not consider that it should be changed or modified at the present time, but of course must, in case an emergency arises, be interpreted with discretion. * * I am returning the contracts to you again and hope you will feel justified in signing without making changes." On the following day plaintiff signed the contract and returned the same, together with copies, to defendant, and wrote: "We have not altered our opinion as

Conference's consent, - * then the time of completion shall be extended for such reasonable time as the Conference may decide. * *."

"Article 27. Delays. Any delay caused by the Contractors shall entitle the Contractor for the work under this specification to an extension of time which shall be equitable and sufficient for the delay to prevent loss. Any extension or postponement of time which is requisite the work, which may be given by the Contractors to the Contractor on account of delay caused by the Contractor, shall be accepted by the Contractor in full satisfaction for any and all claims on account which the Contractor may allege or for loss suffered by reason of or on account of such delay."

From letters introduced by plaintiff upon the trial it appears that the original contract was not materially altered by plaintiff until the latter part of December, 1914, and that shortly prior thereto (which it was some consideration. In December of 1914 plaintiff made claimant. For the alteration of it, the "claim," that Butler plaintiff claimed the contract be changed which resulted in the main dispute. After returning to Portland of the contract (but not materially) he wrote:

"In connection with Article 27 of the contract, which provides in the usual contract that any extension of time granted by the Commissioners shall be accepted by the contractor as full compensation for any delays or losses which the contractor may have suffered on account of such delay, we desire to call the attention of the Commissioners to the fact that such a provision is practically nugatory. We allude also to a dozen instances where the whole activities of this potentiality could be diverted to any other work, or to an out utility lack the commissioners on Kalchedung will lapse in the inclusion in a contract for public work." " Please let us hear from you."

On September 15, 1914, Cable, an chief engineer of defendant, replied in substance that the delays thereto complained this fully been discussed with defendant's attorney, that on to Article 27 his attorney does not consider that it should be changed or modified as the proposed time, but of course must, in some emergency arises, be interpreted with discretion. * * I am enclosing the contract to you again and in a you will find provided in eighty eighty changes." In the difficulties for plaintiff signed the contract and returned the same, together with copies, to Portland, and wrote: "We have not signed the agreement by

Article 47, but in view of your letter of September 25th, we shall rely on the Commissioners to make a fair and reasonable interpretation of this clause." This correspondence, in our opinion, is here material, in that it bears directly upon the reasons or motives that actuated both parties in executing the supplemental agreement of January 27, 1925, hereinafter mentioned. It will be noticed that defendant refused to eliminate the paragraph from the original contract, when requested so to do, but wrote, in case of an emergency arising, that it must be "interpreted with discretion;" and that plaintiff finally signed the contract containing the mentioned paragraph, fully realizing its import and effect, and then deciding to rely upon defendant making a "reasonable interpretation" of it in the future. And the evidence discloses that when the emergency did arise defendant made such "reasonable interpretation" of the paragraph by joining with plaintiff in the execution of the supplemental agreement. By the terms of the original contract it was provided that plaintiff's entire work, including the sidewalk slabs, should be completed by April 1, 1925, and that defendant should cause the removal of the building or buildings on the site of the proposed viaduct by August 1, 1924; and that certain steel work of the bridge, to be encased in concrete, was to be completed by other contractors of defendant by October 1, 1924. And it appears that through no fault of plaintiff the removal of the buildings was not accomplished until September 14, 1924; that said steel work of the bridge was not completed until January 15, 1925; and that these delays retarded plaintiff in the performance of his work and damaged him. He testified: "We expected to do the great bulk of our work in the months of August, September, October and November; those are the good working months in Chicago, and even part of December is normally good weather; instead of that the great bulk of this work was done, starting in December, in December, January, February and March, under very

severe weather conditions; * * because of this we had to double up our gang of men, doing the work in less actual time measured in working hours than we would normally; and, of course, all of this interfered with the efficiency of our operations." It further appears that during January, 1943, after plaintiff had made application for an extension of the time of completion of the work, and for damages or extra allowances because of the mentioned delays, numerous conferences were had between plaintiff and White and other officials of defendant, resulting finally in the execution of said supplemental agreement. As to these negotiations and the outcome thereof, plaintiff further testified: "In December, 1942, when cold weather had started, we served notice on the Commissioners that we must suspend our operations; shut down the job; there was some talk of pushing it through the winter because of the necessity of opening this driveway in the spring, and we prepared an estimate of heating materials and protecting the concrete, because of working in the cold weather, of approximately $40,000; this we took down to the office of the Commissioners and had a meeting with Mr. Foster and Mr. White on the subject; at that meeting the subject of the additional amount of lumber required was broached, and we stated that if we were given an order for $40,000 we would furnish the extra lumber required without further charge; however, the order issued to us, after considerable negotiation, was only 'not to exceed $25,000,' instead of $40,000, and we could not afford to do that on those terms." White, defendant's witness, testified that he "had a great deal to do with the working out of the details of this supplemental agreement," and further testified, in answer to a question asked of him by the court: "There was nothing in the way of any order that involved the speeding up of the work, except what was comprised in this supplemental agreement. * * It (the agreement) was framed up to give him

[illegible]

[illegible]

[illegible]

(plaintiff) an extension in the spring to compensate for what he claimed was lost in the fall, and the price paid him was assumed to cover all of the additional costs for keeping the work going during the winter." This supplemental agreement (introduced by plaintiff) is dated January 27, 1925, is between plaintiff as "Contractor" and defendant as "Commissioners," is signed and sealed by them, and is as follows (italics ours):

Whereas, on August 14, 1924, the Contractor and Commissioners entered into a certain contract for the construction of the 23rd street boulevard viaduct over the Illinois Central Railroad, and

Whereas, said contract provided that the work to be done by the Contractor should be completed by April 1, 1925, and also provided that the building at the northeast corner of 23rd street and South Park avenue should be removed by August 1, 1924, and that the steel work for the bridge, which is to be encased in concrete, would be completed by October 1, 1924, and

Whereas, the removal of said building was delayed until September 14, 1924, and the steel work was not completed until January 15, 1925, and the contractor was thereby damaged in the performance of his work, and

Whereas, in said contract of August 14, 1924, the parties did not contemplate the placing of concrete during the severe cold weather in the winter, and

Whereas, the Contractor has agreed, if he be permitted to proceed with the placing of the concrete in the work required under his contract of August 14, 1924, that he will do so immediately, agreeing to replace any defective concrete, which may be found in the work at any time between this date and the date of finishing said contract, at no cost to the Commissioners, and the Contractor agreeing to finish his contract by May 2, 1925, to the extent at least of permitting the construction of a driveway across the approaches and bridge, * * all of the contract to be finally completed in acceptable condition by June 2, 1925, if the Commissioners will reimburse said Contractor for the additional expense incurred in carrying on the work during the winter time.

Now, Therefore, in consideration of the premises and the sum of $1, etc., it is agreed as follows:

First. The Contractor agrees to immediately proceed with the work to be done by him under the contract of August 14, 1924, and agrees to replace any defective concrete which may be found in the work done by him at any time between now and the finishing of his contract at no cost to the Commissioners; and said Contractor further agrees to finish the work to be done by him under said contract of August 14, 1924, on or before May 2, 1925, to the extent at least of permitting the construction of a driveway across the approaches and bridge; and that in default of said completion of said contract the Contractor will forfeit and pay to the Commissioners the sum of $100 for each and every day beyond May 2, 1925, which is required to complete the work to the extent of permitting the construction of a driveway across the approaches and bridge; and the said Contractor agrees to fully complete his contract of August 14, 1924, on or before June 2, 1925.

Second. In consideration of the additional expense incurred by the Contractor in carrying on the work during the cold weather,

(plaintiff) an extension in the spring to compensate for what he claimed was lost in the fall, and the prime said he assumed it were all of the additional work for which he could be paid during the winter." This supplemental agreement (hereinafter by plaintiff) is dated January 27, 1922, is between plaintiff as "Contractor" and defendant as "Commissioners," is signed and sealed by them, and is as follows: (italics ours):

"Whereas, on August 16, 1921, the Contractor and Commissioners entered into a certain contract for the construction of the third street bridge over the Illinois Central Railroad, and

"Whereas, said contract provided that the work is to be done by the Contractor should be completed by April 1, 1922, and also provided that the building of the superstructure of third street over such track should be removed by August 1, 1922, and that the steel work for the bridge, which is to be erected in sections, would be completed by October 1, 1922, and

"Whereas, the removal of said building was delayed until September 14, 1922, and the steel work was not completed until January 12, 1923, and the contractor was hindered and delayed in the performance of his work, and

"Whereas, in said contract of August 16, 1921, the parties did not contemplate the placing of concrete during the severe cold weather in the winter, and

"Whereas, the Contractor has stated, if he be permitted to proceed with the placing of the concrete in the deck structure under his contract of August 16, 1921, that he will incur the *possibility* of injuring any defective concrete, which may be found in the work at any time between this date and the time of finishing said contract, at no cost to the Commissioners, and the Contractor requests to finish his contract by May 1, 1923, on the express *limit* of permitting the construction of a roadway across the superstructure and bridge, * * all of the contract to be finally completed in acceptable condition by June 1, 1923, if the Commissioners will *endorse* with Contractor for the *completion* requested in accepting as the work *within the stated time*.

"Now, therefore, in consideration of the premises and the mutual agreements of the parties hereto, it is agreed as follows:

"First. The Contractor agrees to immediately proceed with the work to be done by him under the contract of August 16, 1921, and agrees to perform any defective concrete which may be found in the work done by him at any time between May 1st and the completion of his contract at no cost to the Commissioners and said Contractor further agrees to *finish* the work to be done by him under said contract of August 16, 1921, on or before May 1, 1923, in the manner as least of permitting the construction of a driveway across the superstructure and bridge and that in default of said completion of said contract the Contractor will forfeit and pay to the Commissioners the sum of $100 for each and every day beyond May 1, 1923, which is required to complete the work in the manner of permitting the construction of a driveway across the superstructure and bridge and the said Contractor agrees to fully complete his contract of August 16, 1921, on or before June 1, 1923.

"Second. In consideration of the additional expense incurred by the Contractor in carrying on the work during the cold weather,

the Commissioners agree to pay to said Contractor a sum not exceeding $3,000, and also agree to pay to him the cost of labor and materials necessary for heating and protecting the concrete laid in the period between this date and April 15, 1925, the amounts of such additional payments to be determined by the General Superintendent of the Commissioners from statements of such additional cost submitted to said General Superintendent by the Contractor and approved by the Commissioners' inspector on the work and the Commissioners' Chief Engineer.

It Being Understood and Agreed that in no event shall the additional payments herein agreed to be made, including the sum of $3,000 above referred to, exceed the sum of $25,000.

Third. In all other particulars the contract of August 14, 1924, shall remain in full force and effect."

It further appears from the evidence that immediately following the execution of the supplemental agreement plaintiff proceeded with the work; that it was so far advanced by May 2, 1925, that no part of the penalty mentioned in the agreement was exacted; that the entire work was substantially completed during the summer of 1925; and that plaintiff thereafter received additional payments from defendant, over and above the original contract price, aggregating over $40,000, of which the full $25,000 mentioned in the supplemental agreement is a part.

From correspondence introduced by plaintiff it further appears that on October 28, 1926, plaintiff wrote defendant a letter in which, after outlining the difficulties encountered in performing his contract and giving a long list of additional items claimed, aggregating over $90,000, he concluded: "Enclosed with this letter is a final statement of our account, including the items enumerated above. We have only received to date $573,937.04 on account of our contract, and inasmuch as the bulk of this work has been done for over a year, we trust that you will arrange for a final settlement at an early date." On June 13, 1928, plaintiff again wrote defendant, enclosing itemized claims for additional expenses (which are substantially the same as those contained in the bill of particulars filed in the present suit), and stating in part:

"The failure of the Commissioners to turn over the premises on the dates agreed upon seriously interfered with the

the Commissioners agree to pay to said Contractor a sum not exceeding $5,000, and also agree to pay to him the cost of labor and materials necessary for heating and protecting the concrete work in the period between this date and April 15, 1925, the amounts of such additional payments to be determined by the General Superintendent of the Commissioners from statements of such additional cost submitted to said General Superintendent by the Contractor and approved by the Commissioners' Inspector on the work and the Commissioners' Chief Engineer.

It being understood and agreed that in no event shall the additional payments herein agreed to be made, including the sum of $5,000 above referred to, exceed the sum of $25,000.

Third. In all other particulars the contract of August 24, 1924, shall remain in full force and effect."

It further appears from the evidence that immediately following the execution of the supplemental agreement plaintiff proceeded with the work; that it was so far advanced by May 1, 1925, that no part of the penalty mentioned in the agreement was exacted; that the entire work was substantially completed during the summer of 1925, and that plaintiff thereafter received additional payments from defendants, over and above the original contract price, aggregating over $40,000, of which the full $25,000 mentioned in the supplemental agreement is a part.

From correspondence introduced by plaintiff it further appears that on October 21, 1925, plaintiff wrote defendants a letter in which, after outlining the difficulties encountered in performing the contract and giving a long list of additional items claimed, aggregating over $90,000, he concludes: "Enclosed with this letter is a final statement of our account, including the items enumerated above. We have only received to date $379,867.84 on account of our contract, and inasmuch as the bulk of this work has been done for over a year, we trust that you will arrange for a final settlement at an early date." On June 12, 1926, plaintiff again wrote defendant, enclosing itemized claims for additional expenses (which are substantially the same as those contained in the bill of particulars filed in the present suit), and stating in part:

"The failure of the Commissioners to turn over the premises on the dates agreed upon seriously interfered with the

execution of our contract, made the job a winter operation and caused us severe losses for which we are asking to be reimbursed. We are enclosing herewith detailed statements of our claims for the additional expenses involved, * * and we ask that you give this matter your attention at an early date and arrange for a conference in order that the matter may be finally disposed of in an amicable fashion. We trust that in disposing of these claims you will give due consideration to the extraordinary speed displayed by our organization as shown on the enclosed pamphlet, once the premises were turned over to us."

Thereafter conferences were had from time to time between plaintiff and defendant's representatives, but the latter took the position in substance that, because of the provisions of the supplemental agreement, the conditions existing when it was signed, and the actions thereafter of both parties in compliance with it, there was no merit in plaintiff's claims. On March 1, 1929, plaintiff wrote defendant a letter, "for attention of Mr. Linn White," in part as follows:

Pursuant to our conversation yesterday, we are summarizing for your convenience our contentions in connection with our claims on the 23rd street viaduct job.

You have taken the stand that when we entered into our supplemental agreement with you of January 27, 1925, all possible claims of ours were thereby covered. To this we must make strenuous objections.

Reviewing the history of this agreement, we find that it was drawn after we had taken the stand that we would be forced to shut down the work if we were not reimbursed for the additional expense of heating materials and protecting concrete, - in other words, the extra cost of proceeding under winter conditions, a situation that was not contemplated when our contract was entered into.

The writer, who handled the negotiations with your Messrs. White and Foster, never at any time during the progress of those negotiations had anything in his mind other than the actual, direct cost of winter work. * *

We can honestly say that at the time of entering into this agreement, we considered only the cost of providing enclosures and heat to prevent the concrete from freezing, and the expense of properly heating the concrete aggregates before mixing. We are not certain, of course, of what was in the minds of Mr. White and Mr. Foster * *. Even tho this agreement were designed to cover all extra cost of whatever nature because of these delays (which we feel certain it does not), we do not believe that the Commissioners would want to take an advantage of this kind, when all that was in our mind at the time of executing this agreement was the direct cost of heating materials and protecting concrete, and that is all we have been paid for.

Finally, defendant refused to pay plaintiff any further moneys on plaintiff's claims and on April 23, 1930, he commenced the

Thereafter conferences were had from time to time between plaintiff and defendant's representatives, but the latter took the position in substance that, because of the provisions of the supplemental agreement, the conditions existing when it was signed, and the actions thereafter of both parties in complying with it, there was no merit in plaintiff's claims. On March 2, 1949, plaintiff wrote defendant a letter, "for attention of Mr. Elmer Tuttle," in part as follows:

> Referring to our conversation yesterday, we are enclosing for your consideration our comments in connection with our claims on the 1948 season claims.
>
> You have taken the stand that when we entered into our supplemental agreement with you on January 27, 1948, all possible claims of ours were thereby covered. We think we must make strenuous objections.
>
> Reviewing the history of this agreement, we find that it was drawn after we had taken the stand that we could be forced to do what from the very at no time entertained for the additional expense of hauling materials and production equipment - in other words, the extra cost of producing under other conditions, a situation that was not contemplated when our contract was signed in 1947.
>
> The minor, the hauling the negotiations with your Tuttle and Taylor, never at any time during the progress of these negotiations had mentioned in his mind other than the actual, direct cost of minor work. * *
>
> We can honestly say that at the time of entering into this agreement, we considered only the cost of providing equipment and had to present the minutes from Prentiss, and the expense of properly hauling the numerous appropriations during. We are not certain, of course, of what was in the minds of Mr. Tuttle and Mr. Taylor * *. Even the this agreement were designed to cover all other cost of whatever nature because of these things (which we feel they did not), we do not believe that the commissioners would sanction it does not. We do not believe that the commissioners would be in the on acceptance of this kind, when all that was in our mind at the time of executing this agreement was the direct cost of hauling materials and production equipment, and that is all we have been paid for.

Finally, defendant refused to pay plaintiff any further money on plaintiff's claims and on April 22, 1949, he commenced the

present action.

On the trial it appeared from the testimony of defendant's witness, Lovewell, and from defendant's engineer's "estimate," dated September 8, 1927, that there was still due to plaintiff $500 on the original contract. And it further appeared that, as to the claim for changes made "in the jointing of the sidewalks" (mentioned in paragraph 8 of the bill of particulars) plaintiff had agreed to accept the sum of $500 therefor. Plaintiff testified: "We were offered $500 by defendant's representatives for that item, and at the time that offer was made we were discussing all the items in an endeavor to settle this whole thing amicably without litigation, subject to the acceptance of other items and the settlement of the whole thing. I think it is probable that we said we would accept $500 on this item." White testified: "Mr. Brundage agreed to accept $500 for item No. 8, the change in the sidewalk plans. I was present when he made such an agreement." The court's finding of $1,000, in favor of plaintiff, is made up of these two items of $500 each. And by said finding the court in effect held that plaintiff was not entitled to recover anything upon his claims as contained in paragraphs 1 to 7, inclusive, of his bill of particulars, and only $500 upon his claim of $1405.17, as contained in paragraph 8 of said bill of particulars.

After carefully reviewing the evidence contained in the present record and particularly the provisions of the supplemental agreement, we are of the opinion that the court's finding and judgment are amply sustained by the evidence, that under a proper construction of the supplemental agreement plaintiff is not entitled to recover any further moneys from defendant by reason of his claims as set forth in paragraphs 1 to 7, inclusive, of his bill of particulars, and that the judgment appealed from should be affirmed.

In view of the circumstances and conditions existing,

present action.

In the point is apparent from the testimony of defendant's witness, Lawrence, and from defendant's exhibit "Minutes," dated September 8, 1967, that there was still due to plaintiff $800 on his original contract. And it further appeared that, on the date for the change order "In the jurisdiction of the administrative [illegible] in paragraph 8 of the bill of particulars) plaintiff had agreed to accept the sum of $800 therefor. DEFENDANT testified: "I were offered $800 by defendant's representatives for that item, and at the time that offer was made we were discussing all the items in an effort to settle this whole thing amicably without litigation, subject to the acceptance of other items and the settlement of the whole thing. I think it is probable that we made no verbal acceptance of the $800 on this item." Under testified: "Mr. Brownage agreed to accept $800 for item No. 8, the change in the sidewalk phase. I was present when Mr. Brownage made the agreement." The court's finding of fact, in favor of plaintiff, is made up of these two items of $800 each. And by said finding the court in effect held that plaintiff was not entitled to recover anything upon his claims as contained in paragraphs 1 to 7, inclusive, of his bill of particulars, and $400 upon his claim at item 37, as contained in paragraph 8 of said bill of particulars.

After carefully reviewing the evidence contained in the present record and particularly the provisions of the supplemental agreement, we are of the opinion that defendant's finding and judgment as just indicated by the evidence, that there is proper consideration of the supplemental agreement; plaintiff is not entitled to recover any further amount from defendant by reason of his claims as set forth in paragraphs 1 to 7, inclusive, of his bill of particulars, and that the judgment appealed from should be affirmed.

In view of the aforementioned and foregoing evidence,

as shown by the evidence, at the time said supplemental agreement was executed, we think it appears that both parties then realized that, because of defendant's delays in delivering possession of the site, etc., plaintiff would be compelled to do the bulk of his work during cold weather and at a greater cost to him than had been contemplated; that a controversy then arose as to the proper amount of extra compensation that should be paid to plaintiff for his immediately pushing the entire work forward to completion as rapidly as possible; and that the parties, after much negotiation, and with full knowledge of the facts and conditions, executed said supplemental agreement in settlement of the controversy. By the agreement plaintiff agreed to immediately proceed with the work and to fully complete the same under the terms and conditions of the original contract (which were to remain in full force) on or before June 2, 1925; and defendant agreed to pay to plaintiff "a sum not exceeding $3,000" for "the additional expense incurred by the Contractor in carrying on the work during the cold weather," and also agreed to pay to him "the cost of labor and materials necessary for heating and protecting the concrete laid" during a specified period, - the amounts of the additional payments to be determined by defendant's general superintendent, etc.; and both parties agreed that "in no event shall the additional payments herein agreed to be made * * exceed the sum of $25,000." The evidence further discloses that thereafter both parties acted upon the supplemental agreement; that plaintiff pushed the work forward and substantially completed it during the summer of 1925; and that defendant paid to plaintiff, in addition to payments made on the contract and for other extra work allowed, the full extra sum of $25,000, - the limit stated in said supplemental agreement. As we read the statements of plaintiff's claims, as contained in paragraphs 1 to 5, inclusive, (they aggregate $91,340.16 and constitute the

as shown by the evidence, at the time said supplemental agreement was executed. It seems it appears that both parties were relying that, because of defendant's delay in delivering possession of the site, etc., plaintiff would be compelled to do the bulk of his work during cold weather and at a greater cost to his than had been contemplated; that a controversy then arose as to the proper amount of extra compensation that should be paid to plaintiff for his increased labor; the matter work forward to completion as rapidly as possible and that the parties, after much negotiating, and with full knowledge of the facts and conditions, entered into supplemental agreement in settlement of the controversy. By the supplemental plaintiff agreed to immediately proceed with the work and to fully complete the same under the terms and conditions of the original contract (which were to remain in full force) on or before June 8, 1928; and defendant agreed to pay to plaintiff "a sum not exceeding $3,000" for "the additional expense incurred by the contractor in carrying on the work during the cold weather." and also agreed to pay to him "the cost of labor and materials necessary for heating and protecting the concrete laid" during a specified period, - the amounts of the additional payments to be determined by defendant's general superintendent, etc.; and both parties agreed that "in no event shall the additional payments herein agreed to be made " exceed the sum of $3,000." The evidence further discloses that thereafter both parties acted upon the supplemental agreement; that plaintiff pushed the work forward and substantially completed it during the winter of 1928; and that defendant paid to plaintiff, in addition to payments made on the contract sum for extra extra work allowed, the full extra sum of $3,000, - the limit stated in said supplemental agreement. So we find the statements of plaintiff's claims, as contained in paragraphs I to 8, inclusive, (they aggregate $47,360.16 and constitute the

major portion of his total claim of $96,220.76) said claims are all based upon the same delays of defendant (viz, failure to deliver the site, etc. by the times agreed, thereby causing additional expense to plaintiff) as caused the parties to enter into said supplemental agreement. In other words, we are of the opinion that by the supplemental agreement defendant agreed to pay to plaintiff, and plaintiff agreed to receive, a sum not to exceed $25,000, as additional compensation, for the very matters and things that are mentioned in said paragraphs in said bill of particulars, and that plaintiff cannot now successfully maintain claims for which he has already received the agreed compensation, as stated in an agreement advisedly made by him.

As to plaintiff's claims as set forth in paragraphs 6 and 7 of the bill of particulars, after considering all the evidence and the contentions of respective counsel relative thereto, we are of the opinion that the court's disallowance of the claims is sufficiently sustained by the evidence. No useful purpose will be served in outlining and discussing the evidence.

The judgment of the circuit court should be and is affirmed.

AFFIRMED.

Scanlan, P. J., concurs.

motor purchase of his total claim of $40,000.00) said claims are all based upon the same design of defendant (viz. failure to deliver the site, and, by the time agreed, thereby making additional expense to plaintiff) so caused the parties to enter into said supplemental agreement. In other words, as one of the opinions that by the supplemental agreement defendant agreed to pay to plaintiff, and plaintiff agreed to receive, a sum not to exceed $25,000, as additional compensation, for the very matters and things are mentioned in said paragraphs in said bill of particulars, and that plaintiff never was particularly minding claims for which he has already received the agreed compensation, as which is an affirmed activity made by him.

As to plaintiff's claims as set forth in paragraphs 1 and 7 of the bill of particulars, after considering all the evidence and the contentions of respective counsel relative thereto, we are of the opinion that the court's findings of the claims in multiplicity mentioned by the evidence. No useful purpose will be served in multiplying and discussing the evidence.

The judgment of the circuit court should be and is affirmed.

AFFIRMED.

Dunham, J. A., concurs.

36427

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

ANDREW A. MCCOWLEY,
Plaintiff in Error.

ERROR TO CRIMINAL COURT, COOK COUNTY.

269 I.A. 655[4]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, Andrew A. McCowley, upon plea of not guilty and trial by jury, was found guilty under an indictment which charged him with the violation of section 253, chapter 38 of the Criminal code (Smith-Hurd's Ill. Rev. Stats., 1931, chap. 38, sec. 253) which provides:

"Whoever, with intent to cheat or defraud another, designedly by color of any false token or writing, or by any false pretense, obtains the signature of any person to any written instrument, or obtains from any person any money, personal property or other valuable thing, shall be fined in any sum not exceeding $2,000, and imprisoned not exceeding one year, and shall be sentenced to restore the property so fraudulently obtained, if it can be restored."

Other provisions in the section are to the effect that no indictment for the offense shall be quashed or person indicted acquited for the reason that the facts set forth in the indictment or appearing in evidence may amount to larceny or other felony; nor shall it be deemed essential to conviction that the property in the goods or things so obtained shall pass with the possession to the person so obtaining it.

The jury having returned a verdict of guilty in the manner and form as charged in the indictment, motions by defendant for a new trial and in arrest were overruled, and defendant was sentenced on the verdict to serve one year in the House of Correction and to

THE PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,

v.

ANDREW A. MOHONEY,
Plaintiff in Error.

ERROR TO CRIMINAL COURT,
COOK COUNTY.

Mr. JUSTICE SCHAEFER DELIVERED THE OPINION OF THE COURT:

Plaintiff in error, Andrew A. Mohoney, upon plea of not guilty was tried by jury, was found guilty under an indictment which charged him with the violation of section 188, chapter 38 of the Illinois Revised Statutes (Smith-Hurd's Ill. Rev. Stats., 1961, chap. 38, sec. 222) which provides:

"Whoever, with intent to cheat or defraud another, designedly by color of any false token or writing, or by any false pretense, obtains the signature of any person to any written instrument, or obtains from any person any money, personal property, or other valuable thing, shall be fined in any sum not exceeding $1,000, and imprisoned not exceeding one year, and shall be sentenced to restore the property so fraudulently obtained, if it can be restored."

Other provisions in the section are to the effect that an indictment for the offense shall be founded on facts indicated sufficient for the reason that the facts set forth in the indictment or appearing in evidence may amount to larceny or other felony; nor shall it be sound sufficient to convict that the property in the goods or things so obtained shall pass with the possession to the person so obtaining it.

The jury having returned a verdict of guilty in the manner and form as charged in the indictment, motions by defendant for a new trial and in arrest were overruled, and defendant was sentenced on the verdict to serve one year in the House of Correction and to

pay a fine of $2000 and costs. After the return of the indictment there was a motion made to quash it which was denied, and defendant contends that the indictment is bad and that this motion to quash should have been granted.

The indictment was returned on November 20, 1931, and averred in substance that one Frankie T. Westbrook and defendant had entered into an agreement on October 22, 1931, whereby she was to convey to defendant an interest in certain improved real estate located in Kansas City, Missouri, and that defendant agreed in said contract to exchange for said Missouri property real estate located in the city of Birmingham in the state of Alabama when he should acquire title thereto and also to give in exchange a certain second mortgage for the sum of $30,000, which mortgage was subject to a prior one for the sum of $42,000 (these two mortgages being liens on real estate situated in Birmingham, Alabama), and also other real estate and mortgages on real estate there situated; that one of the terms and conditions of the contract was that Frankie Westbrook should pay off and have released the mortgage in the sum of $20,000 on the real estate in Kansas City, Missouri; that Frankie T. Westbrook, relying on the promises of defendant to carry out said contract "thereafter, on to-wit, the twenty-third day of October in the year of our Lord one thousand nine hundred and thirty, paid off said mortgage of twenty thousand dollars, and it thereupon became relieved of said last mentioned liens;" further that defendant afterwards on November 1, 1930, in Cook County, Illinois, knowing the terms of the agreement, "unlawfully, wilfully, designedly, fraudulently and falsely did pretend to said Frankie T. Westbrook that he, said Andrew A. Scowley, then and there had ownership and control of said real estate and of said mortgages on real estate situated in said City of Birmingham, and that he said Andrew

pay a fine of $2000 and costs. After the return of the indictment there was a motion made to quash it which was overruled, and defendants contends that the indictment is bad and that this motion to quash should have been granted.

The indictment was returned on November 20, 1931, and averred in substance that one Franklin T. Hawkins and defendants had entered into an agreement on October 22, 1931, whereby she was to convey to defendant an interest in certain improved real estate located in Kansas City, Missouri, and that defendant agreed in said contract to exchange for said Missouri property real estate located in the city of Birmingham in the state of Alabama when he should acquire title thereto and also to give in exchange a certain second mortgage for the sum of $20,000, which mortgage was subject to a prior one for the sum of $40,000 (there the mortgagee being Jimmie on real estate situated in Birmingham, Jefferson), and also other real estate and mortgages on real estate there situated; that one of the terms and conditions of the contract was that Franklin Hawkins should pay all and have released the mortgage on the sum of $40,000 on the real estate in Kansas City, Missouri; that Franklin T. Hawkins, relying on the promises of defendant in carry out said contract "thereafter, on to-wit, the twenty-third day of October in the year of our Lord one thousand nine hundred and thirty, paid off said mortgage of twenty thousand dollars, and it thereupon became relieved of said last mentioned liens" further that defendant afterwards on November 2, 1930, in Cook County, Illinois, having the home of the appellee, "unlawfully, willfully, designedly, fraudulently and falsely did produce to said Franklin T. Hawkins that he, said James T. Hawkins, then and there had accomplished and realized of said real estate and of said mortgages on real estate situated in said City of Birmingham, and that he said James

A. Scowley could convey clear title thereto as provided by the terms of said contract as aforesaid;" that in truth and fact defendant well knew that the mortgage for $30,000 was not a lien upon the real estate in Alabama, but that the total interest of the person who executed the mortgage for $30,000 had been, prior to the execution of the contract, entirely removed and extinguished by certain foreclosure proceedings, and that defendant did not either at the time he executed the contract or at the time he made the false pretenses have any interest in the real estate or the mortgages on said real estate in Alabama.

The indictment stated that these false pretenses were made by defendant to Frankie T. Westbrook with the design and for the purpose of inducing her to sign a certain deed of said real estate in Missouri, whereby she conveyed to defendant the Missouri real estate, and thereupon to have her deliver to defendant the said deed after the same was signed and to obtain her signature to said deed and written instrument; that Frankie T. Westbrook relying on these false pretenses, believing them to be true and being deceived thereby, was induced to sign her signature to the written instrument and deed, and then to execute and deliver the same; that she did then sign, execute and deliver the same, and that defendant in said County of Cook, by means of these false pretenses knowingly, designedly, wilfully, fraudulently and unlawfully obtained her signature to said written instrument and deed, which false pretenses were made by defendant to her with the intent to cheat and defraud her; that defendant so obtained the signature in said manner with the intent to cheat and defraud her, and that by means of the false pretenses, which he well knew to be false, did cheat and defraud her.

It is urged in behalf of defendant that the motion to quash should have been allowed for the reason that the indictment

A. Dowling could convey clear title thereto as provided by the terms of said contract as aforesaid" that in truth and fact defendant well knew that the mortgage for $30,000 was not a lien upon the real estate in Alabama, but that the total interest of the person who executed the mortgage for $30,000 had been, prior to the execution of the contract, entirely removed and extinguished by certain foreclosure proceedings, and that defendant did not either at the time he procured the contract or at the time he made the false pretenses have any interest in the real estate or the mortgage on said real estate in Alabama.

The instrument stated that these false pretenses were made by defendant to induce P. Vandergrift with the design and for the purpose of inducing him to sign a certain deed of said real estate in Missouri, whereby she conveyed to defendant the Missouri real estate, and thereupon he here defaulted to defendant the said deed after the same was signed and to obtain her signature to said deed and written instrument; that Frank E. Vandergrift relying on these false pretenses, believing them to be true and being deceived thereby, was induced to sign her signature to the written instrument and deed, and then to acknowledge and deliver the same; that she did then sign, execute and deliver the same, and that defendant in such family at Cook, by means of these false pretenses fraudulently, wilfully, feloniously and unlawfully obtained her signature to said written instrument and deed, which false pretenses were made by defendant to her with the intent to defraud and believed that defendant so obtained the signature in said manner with the intent to cheat and defraud her, and that by means of the false pretenses, which he will have to be false, did cheat and defraud her.

It is urged in behalf of defendant that the motion to quash should have been allowed for the reason that the indictment

does not contain an allegation of ownership of the property which was obtained by the alleged false pretenses, and People v. Krittenbrink, 269 Ill. 244, and People v. Smith, 342 Ill. 604, are cited. The Krittenbrink case involved a prosecution for larceny and the Smith case, a prosecution for burglary and larceny, in both of which it was held that an allegation of ownership of the property taken was necessary. The statute in this case not only denounces the act of obtaining property by means of false pretenses but also denounces the act of obtaining a signature to a writing by that means. The gist of the offense charged here is that defendant by means of his false pretenses obtained a deed to certain real estate. The ownership of the real estate conveyed by the deed and its situation are alleged in the indictment. The indictment avers (and the proof tended to show) the delivery of this deed. This, we think, is sufficient under the statute.

It is also urged that the indictment is bad for uncertainty, in that the offense alleged was not a continuing one and the indictment averred that the offense was committed on different days, whereas the indictment should allege that the offense was completed at a certain time, and Commonwealth v. Adams, 4 Gray (Mass.) 27, is cited. It is true that by way of inducement, the indictment alleges the execution of a contract for the exchange of real estate, some of which was situated in Missouri and the other in Alabama, and that this contract was made on October 22, 1930. The allegation as to that contract of exchange, however, is only by way of inducement, and the indictment specifically avers that the commission of the offense was on November 1, 1930. We think there is no uncertainty in this respect. While it does aver the happening of certain events which led up to the crime on October 22, 1930, it clearly and unequivocally avers that the offense itself was committed on November 1, 1930.

does not contain an allegation of ownership of the property which was obtained by the alleged false pretenses, and People v. Whitaker, and People v. Smith, 3Ca 111. 4Ill., are cited. The Criminal Code contains a prohibition for larceny and the Smith case, a prosecution for burglary and larceny, in both of which it was held that an allegation of ownership of the property taken was necessary. The statute in Ohio does not only denounce the act of obtaining property by means of false pretenses but also denounces the act of obtaining a signature to a writing by that means. The gist of the offense charged here is that defendant by means of his false pretenses obtained a deed to certain real estate. The ownership of the real estate conveyed by the deed and its signature are alleged in the indictment. The indictment avers (and the proof tended to show) the delivery of this deed. This, we think, is sufficient under the statute.

It is also urged that the indictment is bad for uncertainty, in that the offense alleged was not a continuing one and the indictment averred that the offense was committed on different days, whereas the indictment should allege that the offense was completed at a certain time, and Commonwealth v. Hood, 4 Gray (Mass.) 67, is cited. It is true that by way of inducement the indictment alleges the execution of a contract for the exchange of real estate, some of which was situated in Missouri and the other in Alabama, and that this contract was made on October 22, 1920. The allegation as to that contract of exchange, however, is only by way of inducement, and the indictment specifically avers that the consideration of the offense was on "October 1, 1920." Hence there is no uncertainty in this respect. While it does aver the happening of certain events which led up to the crime on October 22, 1920, it clearly and unequivocally avers that the offense itself was committed on November 1, 1920.

It is also urged that the indictment is bad for duplicity, in that it charges two distinct offenses. Burke v. People, 23 Ill. App. 36, and Beardsley v. People, 23 Ill. App. 33, are cited. The indictment does charge a large number of false pretenses, but it does not charge or attempt to charge any offense with reference to the contract for the exchange of properties. It avers that the crime consisted in obtaining the signature to a written instrument, namely, the deed. While the pleader probably undertook to plead more facts than were necessary, it is not uncertain, repugnant or duplicitous, and is, we hold, sufficient.

It is urged in the next place that there was a complete variance between the indictment and the proof, in that while the indictment alleged a contract between Frankie T. Westbrook and Andrew J. Scowley, the proof disclosed a contract between Frankie T. Westbrook and the United States Realty Corporation, an Alabama concern, in which Scowley and his family controlled a majority of the stock. However, the abstract fails to disclose any objection upon the ground of a variance, and that objection cannot be raised in this court for the first time. People v. Weisman, 296 Ill. 156; People v. Cunningham, 300 Ill. 376. Defendant in his reply brief states that objections were made on the trial on this ground but cites us to no place either in the abstract or in the record where any such objection may be found. This court should not be expected to search the record on this matter without guidance.

It is next urged that the court erred in permitting the introduction of certain photostatic copies of public records from foreign states over the objection of defendant, but again the particular copies of such records are not pointed out nor are we referred to any place in the record where the alleged errors occurred. We are unable to determine to which of 24 different exhibits received in evidence reference is made. If the deeds

It is also urged that the indictment is bad for duplicity, in that it charges two distinct offenses. Burns v. People, 70 Ill. App. 38, and Moughlar v. People, 90 Ill. App. 38, are cited. The indictment does charge a large number of false pretenses, but it does not charge or attempt to charge any offense with reference to the conveyance or ownership of properties. It avers that the crime consisted in obtaining the signature to a written instrument, namely, the deed. While the pleader probably undertook to plead more facts than were necessary, it is not material, repugnant or duplicitous, and is, we hold, sufficient.

It is urged in the next place that there was a complete variance between the indictment and the proof, in that while the indictment alleged a conveyance from Frank Y. Yarbrough and Andrew J. Moudley, the proof disclosed a conveyance between Frank Y. Yarbrough and the United States Realty Corporation, an Indiana corporation, in which Moudley and his family controlled a majority of the stock. However, the charged falls to disclose any objection upon the ground of a variance, and that objection could be raised in this court for the first time. People v. Jackson, 276 Ill. 224; People v. Washington, 300 Ill. 378. Defendant in his reply brief admits this objection came up for the trial on this ground but alleges it to be plain either in the abstract or in the record where any such objection may be found. This court should not be expected to search the record on this matter without guidance.

It is next urged that the court erred in permitting the introduction of certain photographic copies of public records from Marion County over the objection of defendant, but claims the particular copies of such records are not payment out than are we advised in any place in the record where the original records. We are unable to determine in which of the different objects received in evidence reference is made. If the court

to the Missouri property are referred to, it might be said that they appear to have been certified to by the Recorder of Jackson County where the property was situated, and the County Judge of that county certifies that the recorder was the keeper of the records which would be sufficient under the United States Code, title 28, section 688.

It is contended that the judgment should be reversed because the conduct of the trial judge indicated to the jury his belief in defendant's guilt; that the court often asked questions which had been previously asked and by his manner in interrogating defendant indicated his belief in his guilt. One of the incidents objected to is that in which the complaining witness, Mrs. Priestly, was being interrogated concerning the conversation with one Anderson about the Alabama real estate. An objection was overruled by the court, he stating: "Oh, no, he gave her a letter to that. Go ahead." The reference of the court was to a letter which is in evidence and by which the prosecuting witness was directed to have Anderson show her the real estate. In the examination of J. I. Hardin he was asked by the prosecuting attorney whether he got in touch or communicated with defendant after a certain sale by foreclosure took place. There was an objection by the attorney for defendant, whereupon the court intervened asking: "Did you?" to which the witness replied, "Not after the sale." The court then said, "Mrs. Priestley, will you come up here a minute, please." The attorney for defendant objected to a question asked defendant by the court, namely, "Did Hardin ever notify you that the interest was overdue on the first mortgage?" and made an objection to the words in which the question was phrased. The court replied: "Well, he says he never did, it is all right, go ahead." The court then apparently on its own motion conducted a quite lengthy examination of

to the financial property are preferred to, it might be said that they appear to have been overlooked in by the Province of Ontario County where the property was situated, and the County Judge of that county certifies that the remainder was the longer of the remedy which would be sufficient under the United States Code, title 28, section 124.

It is contended that the judgment should be reversed because the conduct of the trial judge instructed to the jury his belief in defendant's guilt; that the court often asked questions which had been previously asked and by his manner in interrogating defendant indicated his belief in his guilt. One of the instances objected to is that in which the complaining witness, Mrs. Priestly, was being interrogated concerning the conversation with one Lehrman about the Lehman trust estate. An objection was overruled by the court, he stating: "Oh, no, he gave her a letter to that. Go ahead." The reference of the court was to a letter which is in evidence and by which the prosecuting witness was directed to have Lehrman show her the trust estate. In the examination of Mr. L. Hardin he was asked by the prosecuting attorney whether he got in touch or communicated with defendant after a certain suit by Ferguson took place. There was an objection by the attorney for defendant, whereupon the learn[illegible] judge: "Did you" to which the witness replied, "Not after the suit." The court then said, "Mr. Priestly, will you come up here a minute, please." The attorney for defendant objected to a question asked defendant by the court, namely, "Did Hardin ever notify you that the interest was overdue on the first mortgage" and made an objection to the words in which the question was phrased. The court replied: "Well, he says he never did, it is all right, go ahead." The court then apparently on its own motion conducted a quite lengthy examination of

defendant, and at the place the attorney for defendant said, "Just a moment, does your Honor think that question is proper," after which the following colloquy occurred:

"The Court: Yes, he may answer that.

Mr. Phipps (attorney for defendant): To which the defense objects.

The Court: Certainly you object. Did she deliver the cancelled notes and mortgages to you for the $20,000.00 second mortgage on the Kansas City property?

Mr. Phipps: We object to the Court's statement.

The Court: Now, I know you do."

It is well settled by the decisions in this state that a judge presiding in a trial of a criminal case should not intimate either by word or action to the jury his own feeling with respect to the guilt or innocence of the defendant who is on trial. Defendant cites People v. Bernstein, 250 Ill. 63, and People v. Egan, 331 Ill. 489. The cases are rare indeed where in a criminal proceeding the court will be justified in undertaking an extended examination of a witness. That is the function of the lawyers who are presumed to be skilled and able to protect the interests of the People and the defendant. In a close case we might reverse. In this case defendant voluntarily testified in his own behalf. The whole record leaves no doubt that he perpetrated an unconscionable fraud. We are not disposed to reverse for a merely technical error where in a case of this kind substantial justice has been attained.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

[illegible] and at the place the attorney for defendant said, "Just a moment, does your Honor think that question is proper," after making the objection mentioned:

"The Court: Yes, he may answer that.

Mr. Phipps (attorney for defendant): To which the defense objects.

The Court: Certainly you object. Did she deliver the necessitated notes and mortgages to you for the $20,000.00 second mortgage on the Kansas City property?

Mr. Phipps: To objects to the Court's statement.

The Court: Yes, I know you do."

It is well noticed by the decisions in this state that a judge presiding in a trial of a criminal case should not indicate either by word or action to the jury his own feeling with respect to the guilt or innocence of the defendant who is on trial. Defendant cites State v. Bonebrake, 280 Ill. 82, and State v. Jones, 288 Ill. 480. The cases are quite labored where in a criminal proceeding the court will be justified in monitoring or crossed examinations of a witness. That is the function of the lawyers who are presumed to be skilled and able to protect the interests of the people and the defendant. In a close case we might reverse. In this case defendant voluntarily testified in his own behalf. The whole record leaves no doubt that he perpetrated an unconscionable fraud. We are not disposed to reverse for a merely technical error where in a case of this kind substantial justice has been obtained.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

Burnside, P. J., and O'Connor, J., concur.

36294

IN RE ESTATE OF LAURA HOGAN,
Deceased.

HOWARD H. HANKS,
(Claimant),
Appellant,

v.

THE ESTATE OF LAURA HOGAN,
Deceased,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

269 I.A. 653

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Appellant filed a claim in the Probate court of Cook county against the Estate of Laura Hogan, Deceased, and it was there allowed. The Estate appealed, and in the Circuit court there was a trial de novo by the court and the claim was disallowed. This appeal followed.

The verified amended claim is as follows:

"H. Hanks, being duly sworn, deposes and says that the annexed amended claim against the estate of Laura Hogan, deceased, is just and unpaid, after allowing all just credits, and that on or about April 15th, 1928, he was the holder of a promissory note in the sum of $900.00 with 6% interest, made by Helen Murray; that said note was delivered in trust to Laura Hogan, deceased, for the purpose of collection; that the said Laura Hogan did collect the amount due on said note during her life time, but failed and refused to pay said money to this affiant, and he has no other claim against said estate."

The note upon which the claim was based, aside from the cognovit provision, is as follows:

"Chicago, Ill., April 10, 1928.

"On demand after date, for value received, I promise to pay to the order of Howard H. Hanks Nine Hundred Dollars at Kenwood National Bank, Chicago, with interest at 7 per cent per annum after date until paid. * * *

(Signed) "Helen Susan Murray,
"Howard H. Hanks, Guarantor."

Across its face is written the following: "Cancelled L. Hogan." On the back of the note appears the indorsement of the claimant.

The note was produced on the trial by its maker, Helen Murray, who testified for appellant. The deceased, Laura Hogan, had it in her possession until about January 25, 1930, when Miss Murray paid her the principal and interest due thereon, and the former thereupon cancelled the $900 note and returned it to the latter.

Appellant contends that the finding of the Circuit court is against the manifest weight of the evidence. An able and experienced judge tried the claim and after a careful reading of the evidence we are satisfied that his finding was not only not against the manifest weight of the evidence, but was fully justified by the facts and circumstances in proof. While Nolan, the executor and attorney pro se, tried the case for the estate in the Circuit court, it appears that Bernard A. Cummins, an associate of the former, was the attorney of record for the estate. Cummins testified for the estate, and appellant argues that his testimony should be given little weight, and contends that the entire defense is built upon the testimony of Cummins and that had the trial court tested the testimony of the latter in the light of the law bearing upon the subject he would have been forced to find for claimant. During the cross-examination of Cummins he entered his withdrawal as counsel for the estate and the court then indicated plainly that he understood the law that applies to testimony given under such circumstances, and we are satisfied that he correctly applied the law in determining the weight that should be given to the testimony. Moreover, as we shall hereafter show, the claimant strenuously argues in his brief that none of the statements made by the witness conflicts with any of the evidence of claimant.

Gerson his face is written the following: "Cancelled. Do nugen." On the back of the note appears the indorsement of the claimant.

The note was produced on the trial by its maker, Helen Gurney, who testified for appellant. The executed, Harry Gurney, had it in her possession until about January 28, 1930, when Miss Gurney paid her the principal and interest due thereon, and the former thereupon cancelled the $500 note and returned it to the latter.

Appellant contends that the finding of the Circuit court in against the manifest weight of the evidence. In able and experienced judge tried the claim and after a careful reading of the evidence we are satisfied that his finding was not only not against the manifest weight of the evidence, but was fully justified by the facts and circumstances in proof. While claimant, the executor and attorney *pro se*, tried the case for the estate in the Circuit court, it appears that Bernard A. Cunning, an nonresident of the former, was the attorney of record for the estate. Cunning tried the case for the estate, and appellant argues that his testimony should be given little weight, and contends that the entire estate is built upon the testimony of Cunning and that the trial court tested the testimony of the latter in the light of the law bearing upon the subject he would have proved be find for claimant. During the cross-examination of Cunning by attorney Nix attorney on counsel for the estate and the court then indicated plainly that he misunderstood the law that applies to testimony given under such circumstances, and we are satisfied that he correctly applied the law in determining the weight that should be given to the testimony. Moreover, as we shall hereafter show, the claimant strenuously argues in his brief that some of the statements made by the witness conflicts with any of the evidence of claimant.

Appellant next contends that "the admission of Cummins' testimony regarding the self-serving statements made by Miss Hogan to him was error." Appellant now concedes that the declarations of persons in possession of personal property explanatory of the nature and character of their possessions are competent although they operate in the declarant's own favor. For the law bearing on that subject, see Martin v. Martin, 174 Ill. 371; Andrews v. Votaw, 240 Ill. App. 311, 319; Jones v. Taylor, 261 Ill. App. 403, 415. But during the trial, when the estate sought to interrogate the witness respecting the alleged declarations of Mrs. Hogan, the sole objection urged to the admission of the evidence was that it was not admissible because the claimant was not present at the time the declarations were made. This objection was without merit, and was, of course, overruled. The witness testified, without objection, that he visited Mrs. Hogan at the Lakeside hospital in June, 1928, that he saw the $900 note in her possession, and that she asked him to take the note, and some other notes, from her, and put them in a place of safety, as she had no place to keep them in her hospital room; that Mrs. Hogan told him at that time "that she was assisting in the financing of some lady, I didn't know her name then, in some litigation, and these notes had been given to her for moneys she had advanced." Later on in the examination the witness testified: "She told me that this litigation that she had been financing had been or was about to be settled and she expected to be paid the amount of the notes, and she asked me to come or to have somebody come the next day and take the money she received from the notes." A general objection was made to this answer and a motion to strike was overruled. Appellant now claims that the alleged statements of Mrs. Hogan were not competent evidence, as they amount to "nothing but a narration of past transactions." This contention is a mere afterthought and is without the slightest merit. During the cross-

Appellant next contends that "the evaluation of conflicting testimony regarding the half-moving statements made by Miss Hogan is his own error." Appellant now concedes that the decisions of persons in possession of personal property explanatory of the nature and character of their possession are competent although they operate in the declarant's own favor. For the law declaring on that subject, see Kurtz v. Bertle, 176 Ill. 271; Lachner v. Young, 240 Ill. App. 211, 214; Ebert v. Taylor, 241 Ill. App. 401, 414. Nor during the trial, when the cause sought to introduce the witness respecting the alleged declarations of Miss Hogan, was the sole objection urged to the admission of the evidence was that it was not admissible because the claimant was not present at the time the declarations were made. This objection was without merit, and was of course, overruled. The witness testified, without objection, that he visited Mrs. Hogan at the Lakeside Hospital in June, 1920, that he was the $500 note in her possession, and that she asked him to take the note, and some other notes, from her, and put them in a place of safety, as she had no place to keep them in her hospital room that he. Hogan said she at that time "did she was assisting in the financing of some land, I didn't know her name then, in some litigation, and these notes had been given to her for money she had advanced." Later on in the examination the witness testified "She said as that this litigation that she had been financing had been so very short in be settled and she expected to be paid the amount of the notes, and she asked me to come or to have somebody come the next day and take the money she received from the notes." A general objection was made to this answer and a motion to strike was overruled. Appellant now claims that the alleged statements of Mrs. Hogan were not competent evidence, as they amount to "nothing but a recitation of past transactions." This contention is a mere attachment and is without the slightest merit. During the cross-

examination of Cummins appellant's counsel required the witness to detail all of the statements made by Mrs. Hogan to the witness, and the witness did so. Nor can the claimant justly claim that he was prejudiced by the statement of the witness, for in his reply brief, in referring to the statements in question, he states: "Moreover, an examination of these statements shows that they are not at all in conflict with the evidence produced by claimant. Even the statement supposed to have been made by Mrs. Hogan to Cummins to the effect that she received the notes for money she had advanced, is not in conflict with the claimant's evidence. This is exactly what claimant's witnesses stated on the witness stand: that all the notes had been given to Mrs. Hogan for moneys advanced by her, even Estate's Exhibit 7 for $900.00, but that the reason for giving her this last mentioned note was not for money advanced directly upon it, but for money advanced on the other notes and as additional security therefor."

An able and experienced trial judge heard the evidence and had an opportunity to study the witnesses. He was the trier of the facts and his findings are entitled to the same weight as a verdict of a jury, and they will be sustained unless we are able to say that they are against the manifest weight of the evidence. The burden was upon the claimant to prove his case clearly, and the trial court held that he failed in that regard. In deciding the case the trial court stated that "the evidence in support of the claim is confusing. The claimant has taken three different positions, each is opposed to the other two," and the trial court, in a brief review of the evidence, pointed out the inconsistent positions appellant had taken in attempting to assert a claim against the estate. In referring to the testimony of Straley, the principal witness for claimant, the court said: "Straley's evidence is not clear and not

examination of Counsel for plaintiff's counsel permitted the witness to detail all of the statements made by Mrs. Hagan to the witness, and the witness did so. Her own the claimant Jacob claim that he was prejudiced by the statements of the witness, for in his reply brief, in referring to the statements in question, he stated: "Moreover, an examination of these statements shows that they are not at all in conflict with the evidence produced by claimant. Even the statement supposed to have been made by Mrs. Hagan to Charles to the effect that she received the notes for money she had advanced, is not in conflict with the claimant's evidence. The is exactly what claimant's witnesses stated on the witness stand: that all the notes had been given to Mrs. Hagan for money advanced by her, even Lester's Exhibit 7 for $900.00, but that the reason for giving her this last mortgaged note was not for money advanced directly upon it, but for money advanced on the other notes and an additional security therefor."

An able and experienced trial judge heard the evidence and had an opportunity to study the witnesses. He was the trier of the facts and his findings are entitled to the same weight as a verdict of a jury, and they will be sustained unless we are able to say that they are against the manifest weight of the evidence. The burden was upon the claimant to prove his case clearly, and the trial court held that he failed in that regard. In deciding the case the trial court stated that "the evidence in support of the claim is conflicting. The claimant has taken three different positions, each is opposed to the other two," and the trial court, in a brief review of the evidence, pointed out the inconsistent positions appellant had taken in attempting to assert a claim against the estate. In referring to the testimony of Kornfeld, the principal witness for claimant, the court said: "Kornfeld's evidence is not clear and not

altogether convincing; it is too inconsistent and seemingly quite incredible." After a very careful consideration of all the facts and circumstances in this case we find ourselves entirely satisfied with the action of the trial court.

The judgment of the Circuit court of Cook county is a just one and it should be and it is affirmed.

AFFIRMED.

Gridley, J., concurs.

statutory construction is in the legislature and ordinarily only
interpretive. After a full careful consideration of all the facts
and circumstances in this case we find ourselves unable to
disturb the action of the trial court.

The judgment of the district court of Cass county is a just
one and it should be and it is affirmed.

(signed)

District Jud. concurring.

36328

In the Matter of JOSEPH HAROLD LEVEN, Arrested at Suit of GENERAL CONTRACT PURCHASE CORPORATION, a Corporation.

JOSEPH HAROLD LEVEN,
(Petitioner) Appellant,

vs.

GENERAL CONTRACT PURCHASE CORPORATION,
a Corporation,
(Respondent) Appellee.

APPEAL FROM COUNTY COURT OF COOK COUNTY.

269 I.A. 653

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Petitioner (appellant) filed a petition, in the County court of Cook county, under the Insolvent Debtors' act, for release from imprisonment under a writ of capias ad satisfaciendum issued from the Superior court of said county upon a judgment in a cause wherein respondent was plaintiff and petitioner defendant. Petitioner alleged that malice was not the gist of the action in the cause in the Superior court, and he offered to deliver up his property under the act. Upon a hearing the court found that malice was the gist of the action in the Superior court and remanded petitioner to the custody of the sheriff. This appeal followed.

Petitioner contends "that the praecipe, summons, declaration, verdict and judgment received in evidence, do not, in and by themselves, conclusively show that malice was the gist of the action and was res adjudicata of that question; that the summons is in trespass on the case 'upon premises.' The declaration is predicated on a written contract and charges in one count, fraud and deceit, failure to account and conversion of money; that the verdict of the jury makes no guilty finding but merely states: 'We the jury assess plaintiff's damages.'"

38232

In the Matter of JOHNNY DANIELS
LEAVE, Appeared at Term of Criminal
CONTRACT MOTIONS DISTRICTLY. a
Petitioner.

Johnny Daniels Leave.
(Petitioner) Appellant,

vs.

Criminal Contract Motions Districtly.
a Respondent.
(Respondent) Appellee.

AN, PRESIDING JUSTICE COOKING DELIVERED THE OPINION OF THE COURT.

Petitioner (respondent) filed a petition, in the County Court of Cook County, under the Illinois Contract Act, the Leave Time Limitations under a writ of error to review an Leave issued from the Superior Court of said county upon a judgment in a cause wherein respondent was plaintiff and petitioner defendant. Petitioner alleged that malice was not the plaintiff of the motion in the cause in the Superior Court, and he offered to deliver up his property under the Act. Upon a hearing the court found that malice was the plaintiff of the motion in the Superior Court and remanded petitioner to the custody of the sheriff. This appeal followed.

Petitioner contends "that the question, whether, upon the judgment received in evidence, he had, in and by himself, constructively shot that malice was the plaintiff of the motion and was the motionate of that question; that the commission in issuance on the case 'upon promises.' The determination is erroneous as a matter contrary and charges in the court, Trial and Dants.

Failure to assume and consideration of money; that the verdict of the jury means no guilty finding but merely states: 'We the jury assume STATUTE'S charge.'"

It is very plain that the judgment order of the County court must be sustained. The declaration in the Superior court action consisted of one count. After the judgment had been entered against defendant in that court he sued out, in this court, a writ of error, and we were called upon to decide the nature of the charge alleged in the declaration. In our opinion (General Contract Purchase Corp. v. Leven, App. Ct. Gen. No. 35,596, filed May 17, 1932) we held that "the gist of the action is in tort for the unlawful conversion by defendant of monies belonging to plaintiff," and that "the declaration sufficiently advised defendant of the charge he was called upon to defend, viz., the unlawful conversion by him to his own use of certain monies claimed to belong to plaintiff." In October, 1932, the Supreme court denied a certiorari in that case. Our judgment is conclusive of the question of malice and is res adjudicata. Petitioner has seen fit to recite a long list of cases like Jernberg v. Mix, 199 Ill. 254, in support of this appeal. In that well known case it was held that if there are several counts in a suit against an insolvent debtor and malice is the gist of only one of them, a judgment upon a general verdict is not conclusive that there was malice, and the debtor, upon petitioning for his discharge from imprisonment, may show that the verdict was upon counts of which malice was not the gist, but that if it appears from the pleadings in the civil suit under which an insolvent debtor was imprisoned that malice is the gist of the entire action, the judgment in such action is conclusive of the question of malice, and is res adjudicata. From our judgment and from an inspection of the record, the trial judge in the County court was fully justified in finding that malice was the gist of the entire action in the Superior court case.

It is very plain that the judgment order of the County court must be sustained. The declaration in the superior court action consisted of one count. After the judgment had been entered against defendant in that court he sued out, in this court, a writ of error, and we were called upon to decide the nature of the charge alleged in the declaration. In our opinion (Somers Equitable Insurance Co. v. Doran, App. Ct. Gen. No. 58,804, filed May 17, 1932) we held that "the gist of the action (is in tort) for the unlawful conversion by defendant of monies belonging to plaintiff," and that "the declaration sufficiently advises defendant of the charge he was called upon to defend, viz., the unlawful conversion by him to his own use of certain monies claimed to belong to plaintiff." In Dalzier, 213, the Supreme court decided a certiorari in that case. Our judgment is conclusive of the question of malice and is res adjudicata. Petitioner has been fit to revive a long list of cases like Jacobson v. Sun, 199 Ill. 394, in support of this appeal. In that well known case it was held that if there are several counts in a suit against an insolvent debtor and malice is the plot of only one of them, a judgment upon a general verdict is not conclusive that there was malice, and the debtor, upon petitioning for his discharge from imprisonment, may show that the verdict was upon counts of which malice was not the gist, but that it is apparent from the pleading in the civil suit under which an insolvent debtor was imprisoned that malice is the gist of the entire action, the judgment in such action is conclusive of the question of malice, and is res adjudicata. From our judgment and from an inspection of the record, the trial judge in the County court was fully justified in finding that malice was the gist of the entire action in the superior court case.

The verdict of the jury was as follows: "We, the jury, assess the plaintiff's damages at the sum of $2498.33," and petitioner argues, as we understand it, that the fact that the jury, by its verdict, did not find the defendant guilty, is a decisive factor in determining the instant appeal. There is not the slightest merit in this contention. It appears that the trial court in the original action overruled the general and special demurrers filed by petitioner to the declaration and entered a rule on him to plead to the declaration within fifteen days; that defendant did not stand by his demurrer nor did he file any plea as ordered, and a default judgment was entered against him. The default admitted or confessed the charges alleged in the declaration, viz., that petitioner wrongfully, wilfully, wantonly and maliciously converted to his own use money belonging to the respondent. After default the jury were called merely to assess damages, and the form of their verdict is a proper one.

The judgment of the County court is clearly a just one and it should be and it is affirmed.

AFFIRMED.

Gridley, J., concurs.

The verdict of the jury was as follows: "We, the jury, assess the plaintiff's damages at the sum of $2000.00," and yesterday argued, as we understand it, with the fact that the jury, by its verdict, did not find the defendant guilty, is a decisive factor in determining the instant appeal. There is not the slightest merit in this contention. It appears that the trial court in the original action overruled the general and special demurrers filed by petitioner to the declaration and entered a rule on him to plead to the declaration within fifteen days; the defendant did not stand by his demurrer nor did he file any plea to endorsed, and a default judgment was entered against him. The defendant admitted or confessed the charges alleged in the declaration, viz., that petitioner wrongfully, illegally, maliciously and maliciously converted to his own use money belonging to the complainant. After default the jury were called merely to assess damages, and the form of their verdict is a proper one.

The judgment of the Superior Court is affirmed in toto; the case is remanded to be met in its affirmed.

AFFIRMED.

Bright, J., concurs.

34302

DR. I. I. KAPLIN,
(Petitioner) Appellee,

v.

EVELYN GUTTERMAN et al.,
Respondents.

EVELYN GUTTERMAN,
(Respondent) Appellant.

INTERLOCUTORY

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

269 I.A. 653

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order of the Circuit court appointing a receiver, before sale, for the premises involved in a foreclosure proceeding.

The motion for the appointment of the receiver was supported by the verified bill of complaint and two verified petitions, to which answers were filed by the owner of the equity, appellant. A hearing was had before the chancellor and at the conclusion of the same the order appealed from was entered. It contains the following findings:

"That the premises are described as (here follows the legal description of the premises); and are improved with a one story brick building on a lot 50 by 137 feet, consisting of an automobile showroom, especially designed and built for said purpose, and for said purpose only.

"That said premises are encumbered with a $14,000 first mortgage trust deed, which trust deed was signed by William Arthur Wallace and Lynne R. Wallace, his wife, wherein they released and waived all rights in and by virtue of the Homestead Exemption Laws in the State of Illinois, which trust deed was duly filed of record * * * and upon which trust deed the principal sum has been reduced to $11,000.

"That one Evelyn Gutterman, by and through various conveyances is now the owner of the equity of redemption of the above described premises.

"That by the terms of said trust deed, the entire indebtedness in the sum of $11,000 has become due by its terms

MR. J. E. KALCZYK,
(Plaintiff-Appellee,

v.

JULIEN DETERMAN et al.,
Respondents-

MILDRED DETERMAN,
(Respondent) Appellant.

MR. PRESIDING JUSTICE GENERAL MILLEMANN: THE OPINION OF THE COURT.

This is an interlocutory appeal from an order of the Circuit court appointing a receiver, before suit, for the premises involved in a forcible entry proceeding.

The motion for the appointment of the receiver was supported by the verified bill of complaint and two verified petitions, to which answers were filed by the owner of the equity, respondent. A hearing was had before the chancellor and at the conclusion of the same the order appealed from was entered. It contains the following findings:

"That the premises are described as follows: the legal description of the premises and are improved with a one story brick building on a lot 60 by 127 feet, consisting of an automatic shutter, especially designed and built for said purpose, and for said purpose only.

"That said premises are encumbered with a 1st, 2nd, 3rd mortgage trust deed, which trust deed was signed by William Julien and Irene G. Julien, his wife, wherein they mortgaged and waived all rights in and by virtue of the homestead exemption laws in the State of Illinois, which trust deed was duly filed of record on * * * and upon which trust deed the principal sum has been reduced to $11,000.

"That one Jerome Ballerman, by and through various conveyances is now the owner of the equity of redemption of the above described premises.

"That by the terms of said trust deed, the owners indebtedness in the sum of $11,000 has become due by its terms

on the 27th day of February, A. D. 1932, together with interest thereon at the rate of 6½ per cent per annum to and including the 27th day of February, A. D. 1932, upon which default has been made, together with interest thereon at the rate of 7 per cent per annum from and after the 27th day of February, A. D. 1932.

"That said premises are further encumbered by a junior mortgage trust deed from Evelyn Gutterman and Harry Gutterman, her husband, to Chicago Title and Trust Company, a corporation, as Trustee, and recorded in the Recorder's office of Cook county. * * *

"That taxes for the years 1928, 1929 and 1930 have been paid only in part, and that objections have been filed in the County Court of Cook County as to the unpaid balance.

"And that the property securing the trust deed herein sought to be foreclosed is inadequate and insufficient security for the protection of the holders and/or owners of said notes and/or coupons secured by the trust deed herein described."

It appears that William Arthur Wallace and his wife conveyed the premises to Jacob Weinberg and Theresa Weinberg, his wife, who thereafter conveyed the same to A. B. Randall, who thereafter conveyed the same to Evelyn Gutterman, appellant. It further appears that the junior mortgage executed by appellant and her husband was given to secure an indebtedness of $6,000. Upon the hearing it appeared that the taxes for 1928, 1929, and 1930 had not been fully paid. The taxes for 1928 and 1929 amounted to $957, and while the amount of the 1930 taxes was not stated, it appeared that they were higher than those for either of the two prior years. Two experts testified as to the value of the premises. One, called by petitioner, testified that the reasonable, fair, market value of the premises at the time of the hearing was between $9,000 and $10,000. One, called by respondents, testified that "the total economic value is $24,000;" that in giving that value he assumed that the present depression could not last forever and that in order to fix a fair value one had to look into the future; "my valuation looks into the future."

We agree with appellant's contention that "the burden of showing facts justifying the appointment of a receiver is upon the

on the 27th day of February, i. e. 1920, together with interest thereon at the rate of 6% per annum in and including the 27th day of February, i. e. 1920, upon which refunds has been made, together with interest thereon at the rate of 7 per annum from date of refund to the 27th day of February, i. e. 1920.

"That said premises are further encumbered by a junior mortgage dated June 1st, 1920, between Jackson Dickerson and Lucy Dickerson, his husband, to Citizens Title and Trust Company, a corporation, as Trustee, and recorded in the Recorder's Office of Cook County, * * *

"That taxes for the years 1920, 1921 and 1922 have been paid only in part, and that objections have been filed in the County Court of Cook County to the unpaid balance.

"And that the property according the trust deed herein sought to be foreclosed is inadequate and insufficient security for the protection of the holders and/or owners of said notes and/or coupons secured by the trust deed herein described."

It appears that William Arthur Williams and his wife conveyed the premises to Jesse Goldberg and Theodore Goldberg, his wife, via Quitclaim conveyance in exc. to J. Kendall, the Sheriff after receipt the same in "value Bid-Cash, expiation". It further appears that the junior mortgage executed by appellants and her husband was given to secure an indebtedness of $8,000. Upon the sending it appeared that the taxes for 1919, 1920, and 1921 had not been fully paid. The taxes for 1922 and 1923 amounted to $227, and while the taxes of the 1920 taxes was not shown, it appeared that they were higher than those for either of the two prior years. The experts testified as to the value of the premises. One, called by petitioner, testified that the reasonable fair, current value of the premises at the time of the hearing was between $7,000 and $10,000. One, called by respondent, testified that "the total economic value is $24,000;" and in giving that value he assumed that the present depreciation would not last forever but that it would fix a fair value who but to look into the future; the valuation looks into the future."

We agree with appellant's contention that "the burden of showing facts justifying the appointment of a receiver is upon the

person requesting the appointment." (See Frank v. Siegel, 263 Ill. App. 316.)

Appellant contends that petitioner did not make out a prima facie case. After a careful consideration of this contention we are satisfied that it is without merit.

Appellant further contends that "assuming that the testimony was sufficient to establish a case, it did not do so by the greater weight of the evidence." In support of this contention appellant argues that the testimony of respondents' expert was entitled to as much, if not greater, weight than the testimony of petitioner's expert. The chancellor saw and heard both witnesses and was in a better situation than we are to determine the credibility of each witness and the weight that should be attached to his testimony. But assuming that both witnesses were equally credible, we think the chancellor might well have found that the testimony of the expert for petitioner was entitled to greater weight.

It appears that petitioner and the chancellor were both disposed to practice forbearance toward respondents. The chancellor stated to respondents during the hearing that if they would pay half of the amount then due for taxes he would not appoint a receiver, but they did not see fit to accept this fair offer. Moreover, the counsel for petitioner stated to the chancellor that if the counsel for respondents would give some assurance that they would pay half the amount then due upon the taxes, petitioner would "be more than happy to go along."

Realizing, as we do, the present great depression and the necessity for forbearance in matters of this kind, nevertheless, we are satisfied that the judgment order appealed from is a just one and should be affirmed, and it is accordingly so ordered.

AFFIRMED.

Gridley, J., concurs.

person vacuuming the supermarket." (See Price v. Lynch, 325 Ill. App. 328.)

Appellant contends that petitioner did not make out a prima facie case. After a careful consideration of his contention we are satisfied that it is without merit.

Appellant further concludes that "assuming that the testimony was sufficient to establish a case, it did not do so by the greater weight of the evidence." In support of this contention appellant argues that the inability of "respondents' expert witnesses to be sure, if not greater, weight than the testimony of petitioner's experts." The chancellor saw and heard both witnesses and was in a better situation than we are to determine the credibility of each witness and the weight that should be attached to his testimony. The assertions that both witnesses were equally "credible", or that the chancellor might well have found that the testimony of the experts for petitioner was entitled to greater weight.

It appears that petitioner and the chancellor were both disposed to practice fermentation toward respondents. The chancellor stated to respondents during the hearing that if they would put half of the amount they had been paying, he would not appoint a receiver, but they did not see fit to accept this fair offer. Moreover, the counsel for petitioner stated to the chancellor that if the counsel for respondents would give some assurance that they would not hold the amount they owe upon the score, petitioner would "be more than happy to go along."

Doubtless, as we do, the present court deprecates and the necessity for furtherance in matters of this kind, nevertheless, we are satisfied that the judgment order appealed from is a just one and should be affirmed, and it is accordingly so ordered.

AFFIRMED.

35444

AVERY BRUNDAGE,
Appellee,

v.

SOUTH PARK COMMISSIONERS,
a body politic, incorporated,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

269 I.A. 653

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit for damages for claimed breach of contract commenced April 23, 1930, there was a trial without a jury in June, 1931, resulting in the court finding the issues in plaintiff's favor, assessing his damages at $266,000, and entering judgment against defendant in that sum. The present appeal followed.

Plaintiff's declaration consisted of an amended special count and the common counts, to which defendant filed pleas of the general issue. In the special count plaintiff alleged:

That on September 16, 1925, he was awarded a contract "for certain bridges to be constructed for defendant over the Illinois Central Railroad Company's tracks at Jackson Boulevard, Van Buren street, Congress street, Harrison street and Seventh street, Chicago;" that thereafter, about December 29, 1925, a written contract, dated December 1, 1925, was entered into between the parties, by the terms of which plaintiff agreed "to perform all labor and to provide all materials, tools, supplies and machinery for the construction for defendant of the foundations and structural steel work for said bridges, including the sinking of caissons, driving of piles and construction of abutments for said bridges, and the furnishing and erection of the structural steel for two of said bridges, and the furnishing and erection of sub-columns and bearing boxes for four of said bridges, all in accordance with the drawings and specifications referred to in and made a part of said contract, said entire work to be constructed and finished to the entire satisfaction of defendant;" that the contract provides for the sinking of caissons upon the right of way of the Illinois Central Railroad Company (hereinafter called the Railroad Co.) and, in order to permit the caissons to be properly placed, "required the shifting of the tracks of said Railroad Co." and defendant "agreed to make arrangements with the Railroad Co. to cause said tracks to be shifted so that foundations for each bridge might be placed in accordance with the

construction program outlined in said contract;" that said construction program "required plaintiff to complete all work within the right of way of the Railroad Co. as soon as possible, in order that all the tracks might be shifted to final position at one time and with the least possible delay, and outlined the various portions of the work to be done by plaintiff and the order in which this work was to be accomplished;" that the contract further provided that "all surplus excavations from caissons and abutments should be wasted in Grant Park at such locations as might be designated by defendant's engineers;" that the contract further provided that "all excavations for caissons should be made true to dimensions and of sufficient size only to accommodate lagging, and finished caissons of the exact size shown on the plans in each case, - no excavations should be made beyond the outside surface of the lagging and the shaft should be absolutely plumb;" and that the contract further provided that "borings had been made by defendant to ascertain the character of the soil through which the caissons would be sunk, all of which was shown on the drawings submitted by defendant." And the plaintiff further alleged that he "furnished the material and completed the work required by said contract, and to the satisfaction of defendant, together with certain additional work ordered by defendant, and defendant has paid plaintiff therefor." And plaintiff alleged as breaches by defendant of the contract the following:

"That defendant, in violation and disregard of the obligations and conditions of said contract on its part to be performed, failed to cause said tracks of the Railroad Co. to be shifted within the time and in the manner required by said contract; failed to correctly advise plaintiff of the soil conditions to be encountered in making excavations for said caissons as required by said contract; failed to provide suitable locations for wasting surplus excavations from caissons and abutments as required by said contract; and in other respects failed and neglected to perform the terms and conditions of said contract; whereby plaintiff was greatly hindered and delayed in prosecuting said work and was required to perform and did perform much additional labor, furnish much additional material, and did otherwise lay out and expend large sums of money, in and about the completion of said contract, no part of which was provided for or required of him in and by said contract; all to plaintiff's great loss and damage," etc.

It appears that on April 21, 1931, the court, on defendant's motion ordered plaintiff to file a Bill of Particulars, which was filed during the May, 1931, term, and which is contained in the Bill of Exceptions. It consists of 11 pages, and is divided into 8 paragraphs, containing figures and words setting forth various claims and also the reasons therefor. The aggregate of the claims, as stated, is $266,900.42. For convenience we shall first set forth the amounts as claimed in the several paragraphs, and afterwards the stated reasons, namely:

1. The additional cost to plaintiff in sinking the caissons, "due to unusual soil conditions, of which plaintiff had no notice," is as follows:

(a) Extra excavation and lagging 20,877 cubic feet, at $1.75	$36,709.75	
(b) Extra concrete 19,506 cubic feet, at 38 cents	7,412.28	
(c) Driving lagging	33,064.50	$77,186.53

Note: Charges a and b are based on the unit prices named in the contract. Charge c is based on actual time spent according to plaintiff's job records.

2. Pumping in caissons. Actual hours 26,200 at $2	$52,400	52,400.00
3. Splitting and removing boulders, 1409 hours labor at $1.64½	2,319	2,319.00

4. Delays. * * The aggregate weekly salary of superintendents, timekeepers, engineers, foremen, pump-men, checkers, clerks, watchmen, riggers, etc. was $1600, and the additional expense involved by the delays to plaintiff, "for a period of 22 weeks at $1600 per week," is $35,200

Plaintiff's equipment also was tied up for an additional 22 weeks, and the tying up of this equipment "at a weekly rental of $1167" represents a loss to plaintiff of $25,674

The equipment of the Strobel Steel Const. Co. (plaintiff's sub-contractor for steel erection) also was tied up and said Strobel Co. "have billed" plaintiff as follows:

Locomotive crane 20 days at $30	$600	
Derrick car 53 days at $30	$1590	
	$2190	
10%	219	$2,739

Plaintiff's general office overhead was extended over a period of an additional five months, resulting in an additional expense to plaintiff of $12,500

	$76,113	76,113.00
Amount carried forward		$206,918.53

Amount brought forward $208,018.53

5. "Loss of efficiency in labor," suffered by plaintiff, "of 15 per cent" or a total loss, figured on a labor cost of $217,000, of 32,685.

6. "Expenditures for extra labor, material and expenses," due to unusual conditions, encountered while working in the right of way of the Railroad Co., and its failure to shift its tracks within the time contemplated, and the "electrification" of said railroad

(a) Due to the fact that the tracks were not shifted and plaintiff could not complete the "A" and "B" lines of caissons "until the middle of 1926," plaintiff was "required to run light and power wires from one end of the job to the other, instead of moving the wires from one location to another as the work was finished," causing an "additional expense" of $5,793.00

(b) Due to the "catenary system" of the Railroad Co. being erected, "including high tension wires," the "cost of erecting and dismantling plaintiff's temporary bridges and platforms" over the "A" and "B" lines of caissons was greatly increased as follows:

3 extra days for derrick car and gang for erecting bridges, and 4 extra days for dismantling at $300 a day - - - - - - -	$2100	
Erection of 110 feet of platform at "B" line at Jackson street at extra cost of $4 per foot - - - - - - - - -	$440	
Wrecking 447 feet of platforms at extra cost of $2.50 per foot - - - -	$1117.50	3,657.50

(c) The following additional expense for cutting off the lugs on the caisson rings:

Making 20 templets at $30 each - - -	$600.	
Trying and fitting templets in 30 wells, 180 hours ironworker at $1.92½ - - - - - - - - - - - - -	346.50	
18 hours foreman at $2.50 - - - - -	45.	
Cutting off lugs and spot welding rings, 38 wells x 28 lugs x $1.15	1223.60	
Cleaning, pumping and maintaining caisson tops during this period		
1280 hours digger at $1.60 - - - -	$2048.	
2560 hours labor @ 1.22½ - - -	3136.	
640 hours pumping at $2 - - -	1280.	$8,679.10

(d) Paying Western Foundation Co. (plaintiff's sub-contractor) for piles at $8 apiece for 202 splices on composite piles - - $1010.
10% - - 101. 1,110.00 $19,240.60

Amount carried forward $259,944.13

Amount brought forward [illegible]

5. "Issue of efficiency in labour," sufficiently by plausibility, "of 10 per cent" on a bonus level, figures on a labor cost of £217,000, of [illegible]

6. "Adjustments for extra labour, material and expenses," due to unusual conditions, necessitated with working in the river at way of the Hillman Jam, and its failure to shift its bands within the time contemplated, and the "electrical-line" at work reviewed

(a) Due to the fact that the bands were not shifted and plausibly could not complete the "a" and "b" lines of mainpoint "until the middle of July," plausibly was "required to run night and point where from one end of the job to the other, instead of moving the wires from one location to another as the work was finished," causing an "additional expense" of [illegible]

(b) Due to the "extensive repair" of the installed "at bulk storage," including Aldk terminal wires," the "push of erecting and dismantling plausibly's temporary bridges and platforms" over the "A" and "B" lines of mainpoints are plausibly interpreted as follows:

2 weeks days for erection and and gang for erecting bridges, and 4 extra days for dismantling at [illegible] a day - - - - - - - - [illegible]

Supplies of 2in 2inch of platform as "A" line at Jackson street at rates week of 14 per day. - - - - - - - - - - [illegible]

Erecting 2in 2inch of platforms at rates week of [illegible] per load - - - - [illegible]

(c) The following additional expense for making off the logs on the mainpoint [illegible]

Making 20 bangets, at [illegible] each - - - [illegible]

Tying and fitting jumpleds in [illegible] 1ft basis interpreter [illegible] - - - - - - - - - - - - - - - - [illegible]

Ja moors drawn on [illegible] - - - - - [illegible]

Cutting off logs and ends [illegible]

Making ramps, 20 rolls x 28 logs = [illegible]

Erection, jumping and maintaining [illegible] during this period [illegible] - - - [illegible]

[illegible] - - - [illegible]

[illegible] - - - [illegible]

(d) Paying "extra Foreman" [illegible] [illegible] [illegible] [illegible] - - [illegible]

[illegible] - - [illegible]

Amount carried forward

Amount brought forward		$259,944.13
7. Extra expense for "hauling a large percentage of surplus excavations to 23rd street," viz.		
15,909 yards of spoil at 25 cents	$3,977.	
10%	398.	4,375.00
		$264,319.13

8. "Excess wages paid after October 1, 1926," (when official wage scale in Chicago territory was advanced) in accordance with plaintiff's letter of October 8, 1926		
19,263 hours laborers at 2½ cents	$481.58	
8,017 " carpenters at 12½ cents	1,002.13	
958 " masons " 12½ "	119.75	
1,958 " ironworkers" 12½ "	244.75	
2,235 " hoisting engineers " 13½ "	272.38	
	2,197.59	
Insurance 5-1/2%	117.04	
	2,244.63	
Overhead 5%	112.20	
	2,356.83	
10% commission, exclusive of overhead	224.46	2,581.29
Total amount claimed		$266,900.42

The reasons for the several claims, as stated in said paragraphs of the bill of particulars, are in substance as follows:

1. After referring to section 53 of the specifications (hereinafter set forth), plaintiff states that, "due to soil conditions through which the caissons were sunk, which conditions were not disclosed by the plans or borings furnished to plaintiff by defendant, it was impossible for plaintiff to construct the caissons in accordance with said provisions of paragraph 53 of the specifications, and it became necessary to widen out every caisson at about elevation 52, and to drive the lagging instead of installing it in the usual manner. This required more lagging, larger rings, the excavation of a greater amount of soil and a great deal more concrete to fill the caissons." (As stated above in paragraph 1 of the bill of particulars, causing, as claimed, the expenditure of extra labor and material to the total amount of $77,186.53.)

2. "Because of the presence of an unusual amount of sub-surface water in the caissons, plaintiff was forced to provide equipment and to remove this water," by pumping in the caissons to the actual number of hours of 26,200, and at the claimed cost of $52,400, as stated above in paragraph 2.

3. "In the course of sinking the caissons a number of large boulders were encountered. It is customary in all contracts of this character to allow the extra expense of removing such

boulders." (As stated above in paragraph 3, plaintiff claims 1409 hours of extra labor were expended in removing such boulders, at the cost of $2,319.)

4. "Plaintiff's contract provided for substantial completion by August 7, 1926. A delay of over 5 months occurred in prosecuting this work, which delay resulted from the following unusual conditions, none of which was contemplated at the time the contract was made or disclosed by the plans, specifications or soil tests, viz: Cutting through old water-logged dock, 1 month; cutting out old trestle, 'B' line, 1/4 month; necessity of widening-out caissons and driving lagging because of unusual soil conditions, 1 month; sub-surface water, 1/2 month; unloading of Illinois Central wall, 1/4 month; Illinois Central electrification held up steel work, 1 month, and other operations, 1 month; track shifting not done until spring, 4 months; additional depth of caissons, 1/2 month; change in pile design, 1/4 month; total delays 10 months. Some of the foregoing delays were concurrent; but, allowing a 50% reduction, there was a clear delay of over 5 months. This resulted in plaintiff's organization being held on the job 5 months longer than was contemplated at the time the contract was taken." (The extra cost claimed by plaintiff, because of these claimed delays, aggregates $76,113, as stated above in paragraph 4.)

5. "The contract and specifications contemplated the excavation of the caissons in the right of way of the Railroad Co. at the same time that work was progressing on the caissons under the abutments at each location. This was the only logical program for doing this work involving a minimum amount of equipment and resulting in the most expeditious handling of the operations. When plaintiff started the first caissons under the east abutment at Seventh street, he found that the railroad tracks had not been shifted, and it was not certain that they would be shifted before spring, due to the great hazard and expense of moving the same under winter conditions. Plaintiff, therefore, was forced to defer any work on the 'A' and 'B' line of caissons until after the Railroad Co. had completed the track shifting, which was not entirely completed until the month of May, 1926. At that time practically all of the caissons under both the east and west abutments, except those at Jackson Boulevard west, had been completed.

The Railroad Co. progressed so rapidly with the electrification of its road that it was working in the district covered by plaintiff's contract several months before the time indicated in the Railroad Co.'s schedule. This required plaintiff to accommodate his operations to those of the Railroad Co.

The work under said contract was figured in the summer of 1925, with the expectation that it would proceed immediately. However, due to the progress of negotiations with the Railroad Co., which were not completed until late in the fall of 1925, plaintiff's contract was not delivered nor was the work started until the fall of 1925. A large part of the operation under said contract was, therefore, thrown into the cold winter months. The result of the foregoing condition was that no orderly or systematic plan could be followed by plaintiff in the carrying out of said contract. Plaintiff's operations were subordinated to those of the Railroad Co. at all times, and plaintiff was forced to conduct his work without system and in a most haphazard fashion. Plaintiff's men were scattered over a half-mile of territory in a score of different locations, with a resulting loss in efficiency. All of the foregoing conditions were conditions not contemplated at the time the job was figured and the contract awarded." (And said claimed "loss

conditions." (In which above is paragraph 4, plaintiff claims lack
hours of work Labor were expected to properly work overtime, at the
rate of $1.25.)

6. "Plaintiff's contract provides for substantial
penalties by reason Y, Z[illegible]. A delay of over 8 months occurred in
processing this work, which delay resulted from the following unusual
conditions, none of which was contemplated at the time the contract
was made or disclosed by the plans. Specific claims on each basis,
viz: during through old water-logged basis, I mostly worked out
the trenches, "A" like, 1/4 months basically of [illegible]
[illegible] driving Langley because of unusual soil conditions, 1
months, non-uniform rules, 1/4 months [illegible] of [illegible]
well, 1/4 months [illegible] [illegible] made by [illegible]
[illegible] I [illegible], and other [illegible], I mostly [illegible] not
[illegible] work during, 6 months [illegible] length of [illegible], 1/2
months change in pile design, 1/4 months total delays 18 months.
Some of the foregoing delays were unnecessary but plaintiff a [illegible]
[illegible]. There was a delay delay of over 8 months. This resulted
in plaintiff's representation being held on the job 8 months longer
than was contemplated at the time the contract was taken." (The
[illegible] claimed by plaintiff, because of these claimed delays,
[illegible] "Y" and "Z", as shown above in paragraph 4.)

8. "The contract and specifications contemplated the
discovery of the unknown in the right of way of the Railroad Co.
at the same time that work was progressing on the unknown under
the abutments of such Railroad. This was the only logical program
for doing this work involving a minimum amount of equipment and
resulting in the most economical handling of the operations. Upon
plaintiff entered the first entrance under the road abutment at
[illegible], it was found that the soil[illegible] [illegible] and [illegible]
[illegible], and it was not certain that they would be skilled before
[illegible], due to the great hazard and expense of moving the [illegible]
under conditions. Plaintiff's discovery, was found to differ
[illegible] "A" and "B" line of balance until after the [illegible]
[illegible] had completed the trench [illegible], which was not [illegible]
completed until the month of May, 1[illegible]. It took [illegible] [illegible]
all of the [illegible] under both the [illegible] and [illegible] [illegible]
[illegible] of [illegible] work, [illegible] been completed.

The railroad Co. progressed so rapidly with the
[illegible] of the road bed, it was working in the [illegible]
[illegible] by plaintiff's [illegible] [illegible] [illegible] [illegible]
[illegible] in the railroad Co.'s [illegible]. This [illegible] [illegible]
to accommodate his operations to those of the Railroad Co.

The work under and contract was finished in the [illegible] of
1[illegible], with the exception that it could proceed [illegible] [illegible]. Further
due to the [illegible] of negotiations with the Railroad Co., which
[illegible] [illegible] until late in the fall of 1[illegible], plaintiff's con-
[illegible] was not delivered nor was the work [illegible] until the fall of
1[illegible]. A large part of the operation under this contract was
[illegible] [illegible] the cold winter months. The [illegible] of the
[illegible] conditions was such as reasonably or [illegible] [illegible]
[illegible] by plaintiff in the [illegible] [illegible] [illegible] [illegible]
[illegible] operations were [illegible] in those of the Railroad Co., at
all times, and plaintiff was forced to suspend his work without
[illegible] and in a most [illegible] fashion. Plaintiff's [illegible] were
[illegible] over a [illegible] of [illegible] in a [illegible] of [illegible]
[illegible], with a resulting loss in efficiency. All of the [illegible]
[illegible] conditions were [illegible] [illegible] at the time the
job was planned and the contract awarded." (And said claims "Ten

in efficiency," at the stated per cent of the claimed labor cost, is $32,685, as above set forth in paragraph 5.)

6. As to this paragraph relating to "expenditures for extra labor," etc., and particularly as to the claim as stated in sub-paragraph (c) thereof, ($8,679.10 of the total claim of $19,240.60), plaintiff further states as reasons: "The specifications provided that the tops of certain caissons might be trenched. It was found impossible to do this without great hazard and danger of accident, due to the proximity of the Railroad Co.'s tracks. Plaintiff built the caissons as large as possible, but found when he started to erect the steel that the columns could not be installed without cutting off the lugs on the caisson rings."

7. The stated reasons for the claim of $4,375, in paragraph 7 as above, for "extra" expense for hauling surplus excavations to 43rd street, are: "In the concluding paragraph of section 49 of the specifications (hereinafter set forth) it is provided all surplus excavations 'shall be wasted in Grant Park at such locations as may be designated by the engineers.' No locations in Grant Park being available a large percentage of the surplus excavations had to be hauled by plaintiff to 43rd street, * * ."

8. The stated reasons for the claim of $2,881.29, in paragraph 8 as above, for "excess wages" paid after October 1, 1926, are: "Due to the delays hereinabove referred to, the execution of plaintiff's contract was extended until after October 1, 1926. On that date the official wage scale in the Chicago territory was advanced, and plaintiff was obliged to pay additional wages over the rate in force at the time the contract was let."

On the trial plaintiff testified at great length in his own behalf, and he called another witness, Arthur H. Sella, general manager of a firm of building contractors in Chicago. Plaintiff also introduced in evidence the contract and specifications in question and numerous other writings, including drawings, photographs, a blue print as to "borings," and letters written by plaintiff to defendant during the progress of the work and thereafter. Some of these letters were admitted over defendant's objections as being (as they apparently are) self-serving documents. Defendant's principal witness was Linn White, the chief engineer of defendant, in general charge of the construction of the bridges, etc. in question. Defendant also called as its witnesses, William G. Evans and R. C. Smith, civil engineers, and George S. Allen, superintendent of construction of a firm of architects. And defendant also introduced certain maps, blue prints and photographs. The material parts of certain

paragraphs of the contract in question (dated December 1, 1925, but not actually executed and delivered until December 29, 1925, and in which plaintiff, as first party, is designated as the "Contractor," and defendant, as second party, as the "Commissioners") are as follows (italics ours):

"First. The Contractor hereby agrees to perform all labor and to provide at his expense all materials, tools, supplies and machinery for constructing and finishing * * in the most substantial and workmanlike manner * * the foundation work and structural steel work for certain bridges to be constructed over the Illinois Central Railroad at Jackson street, Van Buren street, Congress street, Harrison street and Seventh street, Chicago, including the sinking of caissons, driving of piles, construction of the abutments for six bridges, and the furnishing and erection of the structural steel for two bridges, and the furnishing and erection of sub-columns and bearing boxes for four bridges, all in accordance with and at the locations shown in drawings and specifications entitled 'Bridges North of Twelfth St.,' prepared by the South Park Commissioners under date of August 3, 1925, * * and such plans as are stated in the specifications to be furnished to the Contractor by the Engineer, as he is hereinafter defined, a copy of which specifications (marked 'Exhibit A') is attached hereto and made a part hereof; the entire work to be constructed and furnished to the entire satisfaction and acceptance of the Commissioners.

Fourth. The Contractor agrees to complete the work within 250 days after date of contract (i. e. by August 7, 1926); * * it being understood and agreed that the time of commencement, rate of progress and time of completion shall be of the essence of this contract, provided, however, that any delay caused by the Commissioners shall entitle said Contractor to an extension of time within which to complete the said work equal to the delay so occasioned. It is mutually understood and agreed, however, that any extension or extensions of time (not exceeding 30 days) * *, which may be given by the Commissioners to the Contractor, * * on account of delays suffered by the Contractor, shall be accepted by him as full compensation from the Commissioners for any and all damages which he may have suffered by reason or on account of such delay, * *.

Twenty Third. In consideration of the covenants, promises and agreements in this contract specified to be kept and performed by the Contractor, and in consideration of the full and satisfactory completion of the work herein provided for, the Commissioners hereby agree to pay * * to the Contractor the sum of $769,900, to be paid in the manner following as the work progresses:

85 per cent of the value of the work done * * during each calendar month in full compliance with the contract and specifications, * *. The value of the work done * * will be determined by the estimate of the Engineer * * to be made not later than the fifth day of the following month. The remaining 15 per cent shall be retained until the final completion of the work, the issuance of the final certificate by the Engineer * * and the acceptance by the Commissioners.

Twenty-Fourth. In case it shall be determined by the Engineer * * that any variation be required from the specified quantities, then the following schedule of prices shall prevail as to such additions to or deductions from the respective

[illegible]

but was actually awarded and delivered until November 10, 1920,

and in which statutory, or first party, is designated as the

"Contractor," and defendant, or second party, as the "Manufacturer"

are as follows (italics mine):

"First. The Contractor hereby agrees to furnish all labor and to provide at his expense *all materials*, tools, machinery and machinery for constructing and finishing * * in the most workmanlike and satisfactory manner * * the foundation work and structural steel work for certain buildings to be constructed from the drawings furnished [illegible] above stated, [illegible] contractors, brickmen, masons and carpenters, [illegible] including the placing of cellars, erecting of piles, manufacture of the brickwork for the outer walls, and the foundations and [illegible] of the structural steel for the buildings, and the furnishing and erection of reinforcing and bearing boxes for floor beams, all in accordance with and as the foundations shown on drawings and specifications [illegible] 'Antwerp Terrace Apartments,' prepared by the New York Construction Corporation dated [illegible] 1920, * * and such plans as are stated in the specifications to be furnished in the construction by the engineers, as far in manufacture conform, a copy of which specifications (marked 'Exhibit A') is attached hereto and made a part hereof; the entire work to be constructed and furnished in the strict - satisfaction and acceptance of the engineers."

Fourth. The Contractor agrees to complete the work within ninety days after date of contract (i. e., by August 7, 1920); * * in order substantial and agreed that the time of commencement, rate of progress and the completion shall be at the choice of the Contractor, provided, however, that any delay caused by the Commissioner shall entitle said Contractor to an extension of time which shall be equitable and reasonable in the judgment of the engineers. In no event, however, shall *any* delay or extension or *postponement of time* (*not* constituting *it* *impossible*) * * which may be given by the Commissioner to the Contractor, * * on account of delays suffered by the Contractor, shall be accepted by the *Contractor* from the Commissioner for any and all delays which he may have suffered by reason or on account of such delay, * *."

Twenty third. In consideration of the covenants, promises and agreements in this contract specified to be kept and performed by the Contractor, and in consideration of the full and satisfactory completion of the work herein provided for, the Commissioner hereby agrees to pay * * to the Contractor the sum of [illegible], to be paid in the manner following on the work progresses:

On the week of the value of the work done * * during each calendar month in full *payment* *for* the materials and *installation* * *. The value of the work done * * shall be determined by the engineers of the Commissioner * * to be made not later than the fifth day of the following month. The remaining 15 per cent shall be retained until the final completion of the work, the receipt of the final certificate by the Contractor * * and the payment by the Contractor.

Twenty-fourth. In case it shall be determined by the engineer * * that any variation be required from the specifications, conditions, then the difference between the value of plans shall prevail, or be such additions to or deductions from the respective

quantities;" (Here follows such schedule.)

In the specifications, dated August 3, 1928, (upon which plaintiff made his bid, resulting in the awarding of the contract to him) and under the heading "General conditions of the contract," the material parts of certain sections or articles are as follows (italics ours):

"19. Changes in the work. The Commissioners * * may make changes by altering, adding to and deducting from the work, the contract sum being adjusted accordingly. All such work shall be executed under the conditions of the original contract except that any claims for extension of time thereof shall be adjusted at the time of ordering such change. * *."

"23. Local conditions. Each bidder shall acquaint himself with all local conditions that may affect work, such as character of soil, means of access, exposure of situation, etc. Information of this sort, which may be in the possession of the Commissioners, will be given prospective bidders by the Engineer, but no statement of this character, either verbal or written, shall be considered complete, accurate, or binding upon the Commissioners except such as are contained in the attached specifications."

"32. Delays. If the Contractor be delayed in the completion of the work by any act or neglect of the Commissioners * * or any cause beyond the Contractor's control, or by delay authorized by the Engineer, or by any cause which the Engineer shall decide to justify the delay, then the time of completion shall be extended for such reasonable time as the Engineer may decide. No such extension shall be made for delay occurring more than 7 days before claims therefor are made in writing to the Engineer. In case of a continuing cause of delay only one claim is necessary."

In the specifications, under the heading "Specifications for Excavation and Concrete," the material parts of certain other sections are as follows (italics ours):

"48. Local conditions. All the bridges, included in this contract and these specifications, span the tracks of the Illinois Central Railroad. Work must be so handled that both lateral and overhead clearances are maintained and so that traffic may continue without danger or undue interference in the use of the tracks over, under and between which the work is being done. The Commissioners will arrange with the Railroad Co. for such rearrangement of tracks that all foundations for each bridge named may be placed according to the construction program."

"49. Construction Program. The order in which the various items of work shall be done is determined by two factors of paramount importance. First, it is necessary to complete all work within the right of way of the Illinois Central R. R. as soon as possible, without prejudice to the quality of work, in order that all tracks may be shifted to final position at one time, and with the least possible delay, and second, it is necessary to complete and open for traffic, at the earliest possible date, the bridges at Jackson St. and Seventh St.

The following program shall be rigidly adhered to by the

Contractor for the work on the above named bridges. (Here follows a detailed program, described in Xl so-called 'Steps.')

This Contractor shall work 24 hours per day while sinking all caissons for this job, whether caissons are within the right of way or along the right of way.

This program will make it necessary for the contractor to have enough equipment on the job to drive 20 caissons at one time.

This contractor may, at his discretion, for the first few feet of excavation trench if he desires to, but the width from outside to outside of lagging shall not exceed 5'6" in an east and west direction.

The track shifting will all be done without expense to the contractor. * * Approximately half-way between caissons 'A' and the east right-of-way line, the Railroad Co. cannot shift their tracks so as to give a space to be used for the placing of supports for trestle work between caissons and right-of-way line.

All excavation for caissons 'A' shall be removed toward the east and all excavation for caissons 'B' shall be removed toward the west. All surplus excavation from caissons and abutments, not needed for back filling, shall be wasted in Grant Park at such locations as may be designated by the Engineer."

"52. Character of Excavated Material. Borings have been made at the site of each abutment. The character of the material to be excavated is shown on Drawing G-68. The information shown is presumed to be correct, but the Contractor shall take full responsibility for the handling of all material which he may encounter in the construction of this work."

"53. Caisson Excavation. Caissons shall be carried down to bed rock. * * All excavations for caissons shall be made true to dimensions and of sufficient size only to accomodate lagging and finished caissons of exact size shown on the plans in each case. No excavation shall be made beyond the outside surface of the lagging. The shaft shall be absolutely plumb. Any deviation from perpendicular in the walls of the shaft shall be corrected by the contractor at his expense before any concrete is placed. The Contractor shall base his estimate on caissons to be sunk to elevation - 83 Chicago City datum, in each case. Any additions to or reductions therefrom shall be calculated according to the unit prices named in the bid."

"57. Waste Material and Temporary Structures. Stone, old piling, and other waste material, not suitable for back-filling or grading, shall be removed from the site of the work and disposed of by the Contractor. For this purpose he may use the dump provided by the Commissioners along the Lake Front at points indicated by the Engineer. * *"

"58. Surface Water and Pumping. The Contractor shall protect all excavations with watertight curbs and covers to exclude surface and rain water. He shall pump out and remove all water that may be in or enter the excavation. Any flow of water into the excavation shall be diverted through proper water drains to a pump or to be removed by other approved method which will avoid washing the freshly deposited concrete. * *"

"59. Lagging. The shaft for caissons shall be lagged with lagging of approved length, but not exceeding 6'. Each length of lagging shall be thoroughly braced with at least two steel rings of bracing, placed in two sections, bolted together.

departmental for the work on the above named buildings. (Here follows a detailed programme, description to be re-called 'Signs.')

This Contractor shall work in hours per day only, erecting all scaffolding for this job, whether [illegible] the right of way or clear the light of way.

This programme will make it necessary for the contractor to have enough equipment on the job to drive 20 [illegible] at one time.

This contractor may, at his discretion, for the first [illegible] to erecting [illegible] the work [illegible] outside to outside of lighting shall not exceed 5'6" in as much and work elsewhere.

The stock building will all be done without expense to the contractor. * * Approximately half-way between windows 'A' and the back right-hand side, the Contractor shall leave [illegible] as to give a space to be used for the placing of supports for [illegible] work between columns and right-of-way line.

All scaffolding for columns 'A' shall be removed [illegible] the next and all scaffolding for columns 'B' shall be removed [illegible] the work. All hoisting scaffolding from columns and elsewhere, and [illegible] for back [illegible] shall be vacated in front [illegible] at work [illegible] be dismantled by the contractor."

"5b. Character of Demolition Material. Nothing has been made as the job of such demolition. The character of the material to be removed is shown on drawing G-5b. The interior [illegible] to be removed, but the contractor shall take full responsibility [illegible] the contractor [illegible] in the performance of this work."

"6a. Crane Operation. Cranes shall be erected here in New York. * * All scaffolding for cranes shall be made safe in [illegible] and of sufficient size only to be [illegible] hoisting and finished columns of exact size shown on the plans in such [illegible]. No connection shall be made beyond the middle [illegible] of the height. The shaft shall be absolutely plumb. Any deviation from perpendicular in the walls of the shaft shall be corrected by the contractor at his expense before any concrete is placed. The Contractor shall have all materials on columns to be [illegible] - 20 Calendar Day during, in each case. Any additions to or modifications thereof shall be calculated according to the work given based in the bid."

"7a. Trade Safety and Temporary Structures. Under the [illegible] and [illegible] rules [illegible]. The [illegible] for [illegible] or [illegible], shall be removed from the site of the work as [illegible] by the Contractor. For this purpose be [illegible] provided by the contractor when the [illegible] as [illegible] indicated by the [illegible]."

"7b. Surface Water and Drainage. The Contractor shall protect all excavations with [illegible] and remove to [illegible] surface and [illegible] water. He shall [illegible] and remove all water that may be in or enter the excavation. Any [illegible] the excavations shall be carried through [illegible] in a [illegible] or be removed by other approved method which will avoid [illegible] the [illegible] excavations. * *

"7b. Damage. The shaft for columns shall be damaged [illegible] Length, but not exceeding [illegible]. Loss [illegible] of finishing shall be thoroughly [illegible] with or [illegible] the [illegible] of [illegible], placed in the sections, before [illegible].

The lagging shall be tightly wedged against the soil. Lagging shall be made of 3" x 6" sound lumber, dressed and matched with radial joints. * **"

From the testimony of plaintiff and other witnesses, and from writings, the following appears in substance: On September 18, 1925, plaintiff was informed by letter that defendant had awarded to him the contract for the doing of the work. The written contract, although dated December 1, 1925, was not actually executed and delivered until December 29, 1925. In the meantime plaintiff, with defendant's permission, did some preliminary work, and on December 8th he began the setting of poles for a power transmission line. This line was completed about December 21st, and about January 5, 1926, there was installed and put in operation at the Seventh street abutment the first hoisting apparatus, to be operated by the electric power transmitted over said line. No claim is made by plaintiff that he was damaged because the contract was not actually delivered until December 29, 1925, or that defendant did anything to prevent the earlier construction of said power line. Thereafter temporary bridges were constructed at each location and the work of excavation and sinking the caissons was commenced. Caissons along the east side of the Railroad Co.'s right of way were known as "A" line, as distinguished from the line of caissons along the west side, known as "B" line. Plaintiff testified in substance that shortly after the contract was awarded he had numerous conferences with White (defendant's chief engineer) and Monaghue (defendant's general superintendent), at which the plans, specifications and construction program, as outlined in the specifications, were discussed; that he pointed out to them that strict adherence to the schedule was impossible; that he suggested a different and "more logical" plan, which they agreed to; that this plan contemplated starting "at one end of the job with our excavating gang, finish the excavating there, step to the next bridge with that gang, then put a gang of caisson workers on the first site, then

put a gang of caisson workers on the first site, then

as soon as the caisson work was done put the concrete gang in and build the abutment, and follow up with our steel - one gang of workmen following the other in regular order;" that because of many "unforeseen conditions" and of delays of the Railroad Co. in shifting its tracks in its right of way, his plan could not be carried out; that "no bridge could be finished until the abutments within the right of way were completed and none of these abutments could be finished until the caissons within the right of way were finished and these could not be installed until the tracks had been shifted; that then we found, when the Railroad Co.'s forces came down installing their catenaries and charged electric wires, that we would have to stay out of their way; that as a result our operations were more or less hit or miss; that we had to dig a few caissons here and then jump two or three blocks to another location, then have to suspend work here and go down to the site of another abutment or bridge and then come back to the first place to finish that work when the Railroad Co. was out of the way; and that all this greatly disorganized our forces." The testimony of defendant's witness, White, and certain letters disclosed in substance that no agreement was made whereby the general construction program, as outlined in the specifications, was materially altered; and also disclosed that the necessary track-shifting (done by the Railroad Co.) was accomplished from time to time and as plaintiff's work progressed, and that while there was some delay to plaintiff's work caused by certain tracks not being shifted as soon as plaintiff would have liked, such delay was the result of physical conditions which were or should have been apparent to plaintiff at the time he signed the contract. And, in our opinion, much of plaintiff's testimony, as to damages claimed to have been sustained by him because of delays in the shifting of the tracks, from unforeseen soil conditions and other causes, was erroneously admitted over objection because

it tended to vary the terms of the written contract. And plaintiff's testimony disclosed that, in addition to have received "practically all" of the stipulated contract price of $789,000, he made claim for, was allowed and received from defendant additional moneys in large amounts. During his cross-examination he testified:

"I considered section 38 of the specifications at the time of entering into this contract. * * I recognized it as my duty to take care of that surface water * *. I familiarized myself with section 32 of the specifications before entering into the contract. The boulders in question were encountered in the sinking of the caissons. I have filed my claim for the removal of those boulders but have not been paid for such removal. I have not been paid anything for driving lagging or for the extra concrete or for pumping water as set forth in my claim. I was paid for some work done on the top of the caissons in going through the water-logged dock, which involved some water also. I was paid for extra concrete for the additional depth of the caissons. * * I was paid some money for removing the old dock and trestle. I do not recall whether I was paid $2073.60 for extra labor in line 'B' caissons or not, but I was paid something for that work. I do not recall whether I was paid $29,248.03 for extras upon this job. I do not recall the exact amount I was paid for taking out timbers; I was paid the actual extra pay rolls and material required in connection with the extra labor necessitated because of this bulkhead, but I was not paid any overhead on it or for the delay involved therein. I was paid $27,195 for extra cost of steel erection on account of the electrification of the Illinois Central. * * As to extra expense in the amount of $1541.75, caused by the I. C. unloading and tearing down a portion of the west retaining wall, I was paid for certain work in connection therewith, but I don't remember the amount."

On being shown a certain paper, for the purpose of refreshing his recollection, he further testified on cross-examination:

"Yes, I think these are the amounts I was paid, viz: $27,195 for extra cost of steel construction on account of electrification; $25,233.37, on account of extras for old bulkheads, piles, etc., uncovered below ground surfaces, Line 'B' caissons; $4,014.86 for extra labor in Line 'B' for cutting out timbers, for excess cost in handling excavations at tops, and for removing piles and timbers from the I. C. right of way; $2,623.09 for additional insurance, overhead and profit; $6,494.40 for additional length of construction bridges; $1,541.75 for extra expense caused by the I. C. Railroad unloading and tearing down portion of west retaining wall; $1699.09, for extra expense in handling the construction bridges, trestles and platforms, due to the presence of charged wires; $1998.84 for tearing out and reconstructing four lineal feet of earth at retaining wall at 7th street; $1728 for repairing I. C. sewer at 7th street, for extra

concrete for pile piers at Congress street, for dowels in caissons as ordered, for extra reinforcing of steel at manhole, for delay on account of shortage of water, for removing concrete of old bridge foundation, and for retapping 41 wells, carpenter work due to change in panel; and $5,609.53 for excavation, lagging and concrete, canopy, etc., for extra lagging below minus 83 feet and extra concrete, for widening out, for excess concrete in abutment walls on east side and for burring reinforcing rods."

It will be noticed from this testimony that plaintiff, in addition to having been paid practically all of the contract price of $739,900, was allowed by defendant on his various extra claims and paid the further aggregate sum of more than $77,000, and that included therein are certain items which apparently are parts of his present additional and total claim of $266,900, which the trial court by the finding and judgment allowed substantially in full.

In paragraph 1 of plaintiff's bill of particulars he makes a claim of $77,126.53, for additional cost to him for extra excavation and concrete and driving lagging in sinking the caissons "due to unusual soil conditions of which he had no notice." After considering plaintiff's testimony and that of defendant's witnesses, the provisions of the first paragraph of the contract, and the provisions of sections 38, 52, 53 and 59 of the specifications, we are of the opinion that the court should not have allowed the particular claim, (a) because it appears from plaintiff's testimony that he previously had presented a similar claim to the proper officials of defendant, that they allowed portions thereof and refused others, and that defendant paid to him and he accepted the sum of $5,609.53 for extra excavation, extra lagging and extra concrete, and because it further appears that defendant paid to him and he accepted the further sum of $25,233.37, on account of extras for old bulkheads, piles, etc., uncovered below ground surface; (b) because plaintiff did not show by competent evidence the amount of the claimed extra excavation, the amount of extra concrete laid,

or the extra expense for labor for driving the lagging; (c) because plaintiff did not sufficiently show that by the exercise of proper diligence he could not have known of the claimed unusual soil conditions; (d) because under section 28 of the specifications plaintiff, as a bidder for the contract for the work, was required to "acquaint himself with all local conditions that may affect work, such as character of soil," etc., and that, while any information relating thereto in defendant's possession would be given to bidders, yet "no statement of this character * * shall be considered complete, accurate or binding upon the Commissioners except such as are contained in the attached specifications;" and (e) because under section 52 of the specifications, after stating that "borings" had been made at the site of each abutment and that information as to the character of the soil as shown upon a named drawing was "presumed to be correct," it was provided that the Contractor should "take full responsibility for the handling of all material which he may encounter in the construction of the work."

And, in our opinion, the court should not have allowed plaintiff's claim, as set forth in paragraph 2 of the bill of particulars, for "pumping in caissons," in the amount of $52,400. The reason stated for this claim is that, "because of the presence of an unusual amount of sub-surface water in the caissons, plaintiff was forced to provide equipment and to remove this water," by pumping for 26,200 hours at $2 an hour. This claim is made notwithstanding the provision, as contained in section 58 of the specifications, that "the Contractor shall protect all excavations with watertight curbs and covers to exclude surface and rain water," and he "shall pump out and remove all water that may be in or enter the excavation." Plaintiff did not even show by competent evidence the actual number of hours consumed in pumping the water, whether sub-surface or surface water. His testimony, allowed in evidence over

objection, was to the effect that the number of hours claimed for pumping water "was taken from our records," but no records were introduced or testimony given showing what the records disclosed.

As to the claim as set forth in paragraph 3 of the bill of particulars for $2,319, for 1409 hours of labor in "splitting and removing boulders," the only stated reason for the claim is that "it is customary in all contracts of this character to allow the extra expense of removing such boulders." This particular claim should not have been allowed (a) because plaintiff did not show by competent evidence the existence of any such custom, and (b) because such a custom, even if it existed, could not prevail against the terms of the written contract and the attached specifications, which clearly indicate in their entirety that the Contractor, in the work of sinking the caissons and erecting the abutments and foundations, should for the stipulated contract price make all necessary excavations.

In the claim as set forth in paragraph 4 of the bill of particulars for $76,113, for damages for "delays," plaintiff outlines ten causes therefor which, as he alleges, made an aggregate delay of ten months, although, as some of these delays were "concurrent," only a "clear delay" of five months resulted. By the fourth paragraph of the contract plaintiff, as contractor, agreed to "complete the work within 250 days after date of contract," - that is, by August 7, 1926. After testifying that with defendant's consent he did some preliminary work before the contract was executed and delivered (December 29, 1925), he further testified: "We really did not get the full job under way until after the formal contract was sent to us; thereafter we prosecuted the work as rapidly as we could; I think we concluded the major portion of it in the early fall of 1926, although we had some men on the work as late as the early part of 1927; the great bulk of the work was

Motivation, you be the judge! Does the number of hours claimed for painting under "Ala Baba Tree and Jungle," but be provide were tabulated in isolation, given absorbing what the results disclosed.

As to the claim no not funds in paragraph 2 of the bill of particulars for $2,532, for labor hours of Labor in "painting, and removing windows," the only stated reason for the claim is that "it is customary in all contracts of this character to allow the extra expense of removing such buildings." This particular claim should not have been allowed (a) because plaintiff did not show by competent evidence the existence of any such custom, and (b) because such a custom, even if it existed, would not properly regulate the terms of the written contract and the absolute specifications, which clearly indicate in their ordinary that the contractor, in the work of altering the windows and erecting the chimneys and fireplaces, should be the adjusted contract price were all necessary expenditures.

In the claim no not funds in paragraph 4 of the bill of particulars for $7,312, for changes for "delays," plaintiff and Ahmed ben Omeyer therefor which, as he alleges, made an aggregate delay of four months, although, as none of these delays were "permanent," only a "short delay" of five months resulted. By the terms particular of the contract plaintiff, as contractor, agreed to "complete the work within 180 days after date of contract," = that is, by August 7, 1926. After beautifying that with reasonable a= amount he did some preliminary work before the contract was executed and delivered (October 27, 1926), he further testified the really did not get the full job under way until after the lease expired and not so soon, thereafter as prevented the work as rapidly as he could. I think we can judge the major portion of it to the early fall of 1927, although it had been made to the work as late as the early part of 1928. The great bulk of the work was

done by the fall of 1926, but we had men off and on the job for several months in 1927, although the volume was not very great; the work called for by the contract was accepted by the Commissioners and paid for by them; there is a small balance due us, but we received practically all of the money due us under the contract."
In the bill of particulars this total claim for "delays" ($76,113) is itemized in substance as follows: $18,200 for the weekly salaries or wages of various mentioned men on the job for 22 weeks (5 months) at $1600 per week; $25,674 because plaintiff's "equipment" had been "tied up" during a like period of time; $2739, because the "equipment" of plaintiff's sub-contractor for steel erection had been tied up for a like period and plaintiff had been "billed" therefor; and $12,300 for plaintiff's "general office overhead" extended over a like period of time, resulting in "additional expense" to him. Inasmuch as the date originally fixed for the completion of the entire work was August 7, 1926, and as it appears from the evidence that short extensions of the time of completion were from time to time requested by plaintiff and allowed by defendant, and as it appears from plaintiff's testimony as above that the "major portion" or "great bulk" of the work was completed "in the early fall of 1926," it is difficult for us to perceive how plaintiff could have suffered damages because of "delays" in the manner and to the extent as claimed. Furthermore, we are of the opinion that this particular claim is not sufficiently supported by competent evidence and that its allowance by the court, practically in its entirety, is contrary to the evidence and also contrary to the express provisions of paragraph fourth of the contract and section 32 of the specifications, above set forth. In said fourth paragraph of the contract it is provided that "any delay caused by the Commissioners shall entitle said Contractor to an extension of time within which to complete the said work equal to the delay so occasioned," but it is also

done for the fall of 1924, but no bond was off and so the jury had
returned another in 1927, although the issues had not been giving
the work relief for by the contract was accepted by the Commissioners
and paid for by them. There is a small balance due so, but no
received responsibility of the money due to make the accounts.
In the bill of particulars this total claim for "delays" ($75,333)
is lumped in substance as follows: $18,000 for the weekly salaries
of years of various conditions and at the job for 28 weeks (2 months)
at $600 per week; $25,674 because plaintiff's "assignment" had kept
"idle by" causing a like period of time $2718, because the "existence
of plaintiff's subcontractor for steel erection had been kept up
for a like period and plaintiff had been "kept" throughout the
$18,000 for plaintiff's "general office overhead" extended over a
like period of time, resulting in "additional expense" to him.
Lessened on the date originally fixed for the completion of the
entire work was August 7, 1926, and so it appears from the evidence
that about seven-eighths of the time of completion were from time to
time requested by plaintiff and allowed by defendant, and as it
appears from plaintiff's testimony as above that the "major portion"
or "great bulk" of the work was completed "in the regular fall of 1926",
it is difficult for us to perceive how plaintiff would have suffered
damages because of "delays" in the manner and to the extent as
claimed. Nevertheless, we are of the opinion that the particular
claim is not sufficiently supported by competent evidence and that
the allowance by the court, practically in the nominally, is unsound
in the evidence and also contrary to the express provisions of
contract facts of the contract and section 3c of the specifications,
above set forth. In such doubtful proceedings of the contract it is
asserted that "any delay caused by the Commissioners shall entitle
said Contractor to an extension of time within which to complete
the said work equal to the delay so occasioned," but it is also

provided that "any extension or extensions of time (not exceeding 30 days) * *, which may be given by the Commissioners to the Contractor, * * on account of delays suffered by Contractor, shall be accepted by him as full compensation from the Commissioners for any and all damages which he may have suffered by reason or on account of such delay." Counsel for plaintiff, evidently realizing the applicability of these provisions, seek to avoid the force thereof by stating in their brief here filed that provisions of this character "are for the benefit of the contractor" and that similar provisions have been construed in certain adjudicated cases "as saving him from a penalty in the event that he does not complete his work within the time specified in his contract and will not be regarded as fixing his sole measure of compensation therefor." An examination of the cases cited by counsel shows, however, that the provisions of the contracts there in question were materially different from those in the present contract.

As to the two claims as set forth in paragraphs 5 and 6 of the bill of particulars (aggregating $51,925.60) one is for $32,685 "for loss of efficiency in labor" of 15 per cent, figured on a "labor cost of $217,900," and the other is on four different items, aggregating $19,240.60, for "expenditures for extra labor, material and expenses." It will be seen that the reasons given in the bill of particulars for the making of most of these claims are in substance: Delays in the shifting of the tracks in the Railroad Co.'s right of way, and because of said delays, the subsequent unexpected interference with the progress of plaintiff's work caused by the "electrification" of the railroad and its "catenary system," in which were included dangerous high tension wires. In section 48 of the specifications it was provided that the defendant "will arrange with the Railroad Co. for such rearrangement of tracks that all foundations for each bridge named

may be placed according to the Construction Program." And in section 49 (headed "Construction Program") it was provided that it was necessary that all work within the Railroad Co.'s right of way should be completed as soon as possible "in order that all tracks may be shifted to final positions at one time and with the least possible delay." It appears from the evidence that there was some delay in the shifting of some of the tracks and that there was more interference with plaintiff's work because of the Railroad Co.'s electrification work than there would have been had said tracks been shifted sooner. And we are of the opinion that on this account there is some basis for this claim for damages by plaintiff, but not to the extent as urged and apparently allowed in the court's finding and judgment, particularly so when consideration is given to plaintiff's admission that he had been paid $27,195 "for extra cost of steel construction on account of electrification" and $1689.09 "for extra expense in handling the construction bridges, trestles and platforms, due to the presence of charged wires." And we are also of the opinion that plaintiff did not show by competent evidence a loss to him in "efficiency in labor" of 15 per cent "on a labor cost of $217,000," as stated in paragraph 5 of the bill of particulars, nor did he sufficiently show by proper evidence expenditures, aggregating $19,240.60, "for extra labor, materials, etc.," as stated in paragraph 6. And we cannot determine from the present record what net damages, if any, he actually suffered.

As to the claim as set forth in paragraph 7 of the bill of particulars, viz, $4,375 for extra expense for "hauling a large percentage of surplus excavations to Ward street," the stated reason for the claim is in substance that in section 49 of the specifications it is provided that "all surplus excavations from caissons and abutments, not needed for back filling, shall be wasted in Grant Park at such locations as may be designated by the Engineer," and that

may be placed according to the Construction Program." and in
justice of [header "Construction Program") it was provided that
it was necessary that all work within the national co.'s right of
way should be completed as soon as possible "in order that all trucks
may be shifted to final positions at one time and with the least
possible delay." It appears from the evidence that there was some
delay in the shifting of some of the trucks and that there was more
interference with plaintiff's work because of the railroad co.'s
operations than there would have been had such trucks been
shifted earlier. And on the opinion that on this account
there is some basis for this claim for damages by plaintiff, but
not to the extent as urged and apparently allowed in the court's
finding and judgment, particularly on that contention to wit
"plaintiff's subcontractor did not have such difficulties "for other
work of which contractors on account of interference" and
allowed "for extra expense in handling the construction bridges,
trestles and platforms, due to the presence of charged wires." and
we are also of the opinion that plaintiff did not show by competent
evidence a loss in time in "efficiency in labor" of 25 per cent "on
a labor cost of $[illegible]." as stated in paragraph 7 of the bill of
pleadings, nor did he sufficiently show by proper evidence
wrongfulness, according [illegible]. "for other labor, materials,
etc.," as stated in paragraph 8. Let us remove [illegible] from the
proved items that are damages. If any, by actually shifting.

As to the claim as set forth in paragraph 7 of the bill
of pleadings, viz. $4,870 for extra expense for "hauling a large
percentage of cargo excavation in lieu of wheel," the stated reason
for the claim is as follows: that 50 percent of the excavation
is in gravel and "all cargoes excavations from railroads and stor-
ages, and material for base filling, shall be hauled in front loads of
such dimensions as may be designated by the engineer." and that

"no locations in Grant Park were available." After carefully considering all the evidence bearing upon this claim we are of the opinion that the court erred in allowing it. In addition to the provision in said section 49 there was another provision, contained in section 57 concerning waste material, viz: "Stone, old piling and other waste material, not suitable for back filling or grading, shall be removed from the site of the work and disposed of by the Contractor. For this purpose he may use the dump provided by the Commissioners along the Lake Front at points indicated by the Engineer." It does not sufficiently appear that complainant was compelled to haul a "large percentage" of surplus excavations to 23rd street.

And in view of the evidence, and particularly of plaintiff's testimony that the major portion or great bulk of his work was completed "in the early fall of 1926," we think the court erred in allowing plaintiff's claim of $2,691.[illegible] (as contained in paragraph 8 of the bill of particulars) for "excess wages paid after October 1, 1926," upon which date, as claimed, "the official wage scale in the Chicago territory was advanced." It does not sufficiently appear by competent evidence that plaintiff's men actually worked on the job or were actually paid for the number of hours after October 1, 1926, as claimed.

After a careful consideration of the present record our conclusion is that the judgment appealed from must be reversed and the cause remanded. Such will be the order.

REVERSED AND REMANDED.

Scanlan, P. J., concurs.

the business in Green Tree were available." After carefully considering all the evidence bearing upon this claim we are of the opinion that the court erred in allowing it. In addition to the previous in all matters as their are another provision, namely, the balance in another of economically usable materials, viz: "Labor, old pulley and other scrap material, not suitable for back filling or grading, shall be removed from the site of the work and disposed of by the contractor." The claim payment in question was the item provided by the specifications under the Lump Sum of payment indicated by the Engineer." It does not sufficiently appear that substitution was compelled to build a "large percentage" of regular construction in Mud Creek.

And in view of the evidence, and particularly of plaintiff's testimony that the major portion of great bulk of his work was completed "in the early fall of 1930," we think the court erred in allowing plaintiff's claim of $1,[illegible] for contained in paragraph 8 of the bill of particulars for "extra work done after October 1, 1930." Upon which date, as claimed, "the officials were busy in the Clarion Territory and unknown." It does not sufficiently appear by competent evidence that plaintiff's son actually worked on the job or were actually paid for the number of hours after October 1, 1930, as claimed.

After a careful consideration of the pleadings record and contentions in this the judgment appealed from must be reversed and the cause remanded. Such will be the order.

Reversed and remanded.

35848

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

DAVID L. JOHNSON,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Feb. 8, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT

Plaintiff in error, David L. Johnson, hereinafter referred to as the defendant, was charged in an information filed by the State's Attorney of Cook County, in the Municipal Court of Chicago, upon the complaint of George F. Dougherty, with a violation of the provisions of the Illinois Securities Act, on September 1, 1929.

The defendant entered a plea of not guilty, and on August 11, 1931, by leave of court, the plea of not guilty was withdrawn and the court heard the arguments of the parties upon a motion to quash the Information filed by the State's Attorney, and after consideration, the trial court denied such motion. Thereupon the defendant again entered a plea of not guilty. A jury being waived, the trial court heard the evidence, and at the close of the hearing, found the defendant guilty. From the judgment it appears that the defendant was sentenced to imprisonment for a period of three months in the County jail and to a fine of $1,000 and costs.

This prosecution is based upon an information charging the defendant with being an issuer as an officer of the corporation known as the Fairfax Securities Company, Inc., an Illinois corporation, and that on September 1, 1929, in Chicago, he unlawfully offered to sell, and did sell to George F. Dougherty certain securities of said corporation, which were not qualified and which were issued in violation of the provisions of the Securities Law of this State, also known as the Blue Sky Law. Chap. 32, Para.

Opinion filed Feb. 8, 1933

MR. JUSTICE HERRY DELIVERED THE OPINION OF THE COURT:

Plaintiff in error, David L. Johnson, hereinafter referred to as the defendant, was charged in an information filed by the State's attorney of Cook county, in the Municipal Court of Chicago, upon the complaint of George F. Dougherty, with a violation of the provisions of the Illinois Securities Act, on September 1, 1929.

The defendant entered a plea of not guilty, and on August 11, 1931, by leave of court, the plea of not guilty was withdrawn and the court heard the arguments of the parties upon a motion to quash the information filed by the State's attorney, and after consideration, the trial court denied such motion. Thereupon the defendant again entered a plea of not guilty. A jury being waived, the trial court heard the evidence, and at the close of the hearing, found the defendant guilty. From the judgment it appears that the defendant was sentenced to imprisonment for a period of three months in the County Jail and to a fine of $1,000 and costs.

This prosecution is based upon an information charging the defendant with being an issuer as an officer of the corporation known as the Indian Securities Company, Inc., an Illinois corporation, and that on September 1, 1929, in Chicago, he unlawfully offered to sell, and did sell to George F. Dougherty certain securities of said corporation, which were not qualified and which were issued in violation of the provisions of the Securities Law of this state, also known as the Blue Sky Law. Chap. 32, Par.

255 et seq. Cahill's Ill. Rev. Stats. 1931.

In support of the charge, the complaining witness, George P. Dougherty, a deaf mute, testified through an interpreter of the sign language, in substance, that on September 1, 1929, David L. Johnson, the defendant, sold to him 21 shares of the preferred capital stock of the Fairfax Securities Company, Inc., and 34 shares Class "A" common stock of the same corporation, and that the stock was paid for by him by delivering to the defendant certain real estate bonds.

There is also in evidence a typewritten invoice issued by the same corporation, giving in detail the price to be paid by the complaining witness for the stock issued by the corporation and the credit that would be allowed in applying the complainant's bonds in payment, and the evidence shows that the stock certificates of the Fairfax Securities Company, Inc., signed by the defendant as president, were issued and delivered to the complaining witness.

As a result of a demand made by the complaining witness for a return of the bonds after the transaction had taken place, there is in evidence a letter written upon the letterhead of the Fairfax Secutities Company, Inc., addressed to and received by the complainant, and signed "Fairfax Securities Company, Inc. By David L. Johnson," the defendant, in which letter two of the bonds were enclosed which had been received by this corporation as a part of the transaction. Three bonds were returned to the complaining witness after the transaction involved in this proceeding had taken place.

The charter of this corporation and a certificate by the Secretary of State that the Fairfax Securities Company, Inc. had not qualified or complied with the Illinois Securities Law,

Ibid at ser. Pauli's 111. Ser. 3-4a. 1921.

In support of the charge, the complaining witness, George F. Dougherty, a deaf mute, testified through an interpreter c. the sign language, in substance, that on September 1, 1928, David L. Johnson, the defendant, sold to him 21 shares of the preferred capital stock of the Fairlex Securities Company, Inc., and 54 shares Class "A" common stock of the same corporation, and that the stock was paid for by him by delivering to the defendant certain real estate bonds.

There is also in evidence a typewritten invoice issued by the same corporation, giving in detail the price to be paid by the complaining witness for the stock issued by the corporation and the credit that would be allowed in applying the complainant's bonds in payment, and the evidence shows that the stock certificates of the Fairlex Securities Company, Inc., signed by the defendant as president, were issued and delivered to the complaining witness.

As a result of a demand made by the complaining witness for a return of the bonds after the transaction had taken place, there is in evidence a letter written upon the letterhead of the Fairlex Securities Company, Inc., addressed to and received by the complainant, and signed "Fairlex Securities Company, Inc. By David L. Johnson," the defendant, in which letter two of the bonds were enclosed which had been received by this corporation as a part of the transaction. These bonds were returned to the complaining witness after the transaction involved in this proceeding had taken place.

The officer of this corporation and a certificate by the Secretary of State that the Fairlex Securities Company, Inc. had not qualified or complied with the Illinois Securities Law,

were received in evicence as exhibits on the part of the prosecution.

The defendant testified, in substance, that he met the complaining witness in July, 1929; that he negotiated an exchange of the complaining witness's bonds for the stock of the Fairfax Securities Company; that the stock of this corporation, as a part of this transaction, was owned by Irma Johnson, wife of the defendant, of which fact the complaining witness was informed by the defendant at the time of the exchange; that subsequent to the completion of the trade, three of the bonds formerly owned by the complainant were returned to him, and that at the time of this transaction the defendant was not acting as agent of the company.

From the evidence it appears that the stock certificates received by the complaining witness from the corporation in question, were not received from the wife of the defendant, but that the certificates delivered to him were issued by the Fairfax Securities Company, and signed by the defendant as president. It is also clear that the corporation received consideration for the stock, and that fact is demonstrated by a letter of this corporation, signed by the defendant, returning part of the bonds which were received in payment of the so-called stock of the Fairfax Securities Company. That the stock traded in was in the name of Irma Johnson, wife of the defendant, is not borne out by the record.

From the record there does not appear to be any question that the stock of this corporation was not qualified. No pretense is made by the defendant that the issuance of the stock to the complaining witness complied with the Illinois Securities Law, and it is interesting to note that this corporation had an office and that it was occupied by the defendant and a stenographer, both

were received in evidence as exhibits on the part of the prosecution.

The defendant testified, in substance, that he met the complaining witness in July, 1929; that he motivated an exchange of the complaining witness's trade for the stock of the Fairfax Securities Company; that the transaction, as a part of this transaction, was owned by Jack Johnson, wife of the defendant, of which fact the complaining witness had informed by the defendant at the time of the exchange; that subsequent to the completion of the trade, three of the bonds formerly owned by the complainant were returned to him, and that at the time of this transaction the defendant was not acting as agent of the company.

From the evidence it appears that the stock certificates received by the complaining witness from the corporation in question, were not received from the wife of the defendant, but that the certificates delivered to his wife issued by the Fairfax Securities Company, and signed by the defendant as president. It is also clear that the corporation received consideration for the stock, and that fact is demonstrated by a letter of the corporation, signed by the defendant, returning part of the bonds which were received in payment of the so-called stock of the Fairfax Securities Company. That the stock issued is now in the name of Jack Johnson, wife of the defendant, is not before us by the record.

From the record there does not appear to be any evidence that the stock of this corporation was not valuable. No intimate is made by the defendant that the issuance of the stock to the complaining witness complied with the Illinois Securities Law, and it is interesting to note that this corporation had an office and that it was operated by the defendant and a stenographer, both

of whom had desks. The furniture was seized by the landlord for default, and a chattel mortgage thereon was foreclosed, leaving the company without assets. The company was organized with a capital stock fully paid for the sum of $26,500, still it had no assets at the time of the sale of the stock by the defendant to the complaining witness.

It appears from the invoice issued by the corporation and delivered by the defendant to the complaining witness, that 47 shares of preferred stock were valued at $4700, and 48 shares "Class A" stock was valued at $1200. This stock is of no value, for the corporation was not the owner or in possession of any tangible property whatever. From the facts and circumstances it appears that there was fraud in the representation by the defendant of the value of the stock.

The defendant contends that the court erred in that the evidence does not prove beyond a reasonable doubt that the stock in question belonged to Class "D," and also that it was not Class "B" stock. The corporation, not having complied with the statutory provisions of the Securities Law, the stock which was issued, sold and delivered to the complaining witness by its officer, the defendant, was issued by the corporation and sold by the defendant in violation of law. The answer to this contention is that the stock was not qualified when issued and sold, rather than improperly qualified and its proper classification uncertain. If the defendant did not make such sale, or, in making the sale, complied with the law, such must appear from the evidence, and is a matter of defense. People v. Love, 310 Ill. 558.

The defendant relies upon the case of People v. Gillette,

of which Mr. Beale. The furniture was seized by the landlord for default, and a chattel mortgage thereon was foreclosed, leaving the company without assets. The company was organized with a capital stock fully paid for the sum of $50,000, still it had no assets at the time of the sale of the stock by the defendant to the complaining witness.

It appears from the invoice issued by the corporation and delivered by the defendant to the complaining witness, that 47 shares of preferred stock were valued at $4700, and 49 shares "class A" stock was valued at $1200. This stock is of no value, for the corporation was not the owner or in possession of any tangible property whatever. From the facts and circumstances it appears that there was fraud in the representation by the defendant of the value of the stock.

The defendant contends that the court erred in that the evidence does not prove beyond a reasonable doubt that the stock in question belonged to class "B," and also that it was not class "A" stock. The contention, not having complied with the statutory provisions of the Securities Law, the stock which was issued, sold and delivered to the complaining witness by the officer, the defendant, was issued by the corporation and sold by the defendant in violation of law. The answer to this contention is that the stock was not qualified when issued and sold, rather than improperly qualified and the proper classification uncertain. If the defendant did his duty, or, in making the sale, complied with the law, such must appear from the evidence, and in a matter of defense. Cancio v. State, 124 Ill. 884.

The defendant relies upon the case of Ferris v. Collette,

243 Ill. App. 41, as being conclusive upon the questions involved in the instant case. The prosecution in this case is for the issuance, sale and delivery of stock not qualified to justify such a sale. The opinion of the court in People v. Gillette, supra, is to the effect that the fact that the People offered evidence to prove that no statement had been filed in this transaction by the corporation, did not determine the classification of the stock. Our opinion in the instant case is not inconsistent with what was said by this court in that case.

A penalty is provided for violation of the provisions of this act in Chap. 32, Paragraph 283, Sec. 30, in these words:

> "Any issuer or any owner of securities, or any officer, director, trustee, solicitor or agent thereof, whether registered under section twenty-three (23) or not, who shall sell or offer to sell any securities, except in any transaction specifically classified as exempt under the provisions of section five (5) of this act, and except any securities specifically exempt in and by section four (4) of this Act, without full compliance with the provisions of this Act, shall be guilty of a misdemeanor and upon conviction thereof shall for the first offense be punished by a fine in any sum not exceeding ten thousand ($10,000) dollars, or, if a natural person, by imprisonment in the county jail not exceeding one year, or may be punished by both such fine and imprisonment in the discretion of the court."

It is not suggested by the defendant that according to the evidence the sale of stock in question is within the provision of Section four, and is therefore exempt, but he contends that the sale of the stock was an isolated transaction by the owner, Irma Johnson, and being a bona fide owner of such securities, she disposed of her own property for her own account, and therefore under Section five the sale made by this defendant for and on account of Irma Johnson, his wife, is not subject to the provision of the Securities Law. Submitted evidence in this

343 111, Ky. 41, is being considerably upon the questions involved in the instant case. The prosecution in this case is for the larceny, sale and delivery of stock not qualified to justify such a sale. The opinion of the court in Ewrin v. Gillette, supra, is to the effect that the fact that the people offered evidence to prove that no statement had been filed in this transaction by the corporation, did not determine the classification of the stock. Our opinion in the instant case is not inconsistent with what was said by this court in that case.

A penalty is provided for violation of the provision of this act in Sec. 30, Paragraph 288, Sec. 30, in these words:

> "Any issuer or any agent of corporations, or any officer, director, trustee, solicitor or agent thereof, whether registered under section twenty-three (23) or not, who shall sell or offer to sell any security, except in the strongest speculative condition to exempt under the provisions of section five (5) of this act, and except the securities specifically exempt in and by section four (4) of this act, without full compliance with the provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof shall for the first offense be punished by a fine in any sum not exceeding one thousand ($1,000.00) dollars, or, if a natural person, by imprisonment in the county jail not exceeding one year, or may be punished by both such fine and imprisonment in the discretion of the court."

It is not suggested by the defendant that according to the evidence the sale of stock in question is not in the provision of Section four, and is therefore exempt, but he contends that the sale of the stock was an isolated transaction by the owner, Isaac Johnson, and being a bona fide owner of such securities, the disposal of his own property for his own account, and therefore under further the sale made by this defendant for and on account of Isaac Johnson, his alleg, is not subject to the provision of the Securities Law. Substantial evidence in this

case does not support the contention of the defendant, for the reasons indicated in this opinion upon that point.

After a careful consideration of the evidence and the contentions made by the defendant, we are of the opinion that the offense charged was proved beyond a reasonable doubt and that the defendant is guilty.

There being no error in the record, the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON, P. J. AND HALL, J. CONCUR.

35654

HARRY H. MALKIN,

Appellee,

v.

CHARLES M. ROSS, JOE KOMINSKY and ECONOMY PLUMBING & HEATING CO., a Corporation,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

269 I.A. 652

Opinion filed Feb. 8, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is a joint appeal by the defendants from a judgment for $690.40 entered in the Municipal Court of Chicago against the defendants in a fourth class action. The amended statement of claim filed by the plaintiff is based upon a promissory note in the principal sum of $640.00, signed by the Cuyler Building Corporation and endorsed by the defendants. Charles M. Ross and Joe Kominsky, two of the defendants, deny in an affidavit of merits that they were jointly liable with the Economy Plumbing & Heating Company, a corporation. This company in its affidavit of merits denied that it endorsed and delivered the note, or that it was jointly liable with the other defendants.

The court after a hearing, a jury having been waived, found the issues against the defendants and entered judgment for the amount appealed from.

The important question in this case is: Was the trial court in error in entering a joint judgment against the defendants? When the note was offered by the plaintiff and received in evidence it appears from the abstract of record that, for the purpose of appeal, the appellants waived all errors affecting the issues in regard to presentation, dishonor and notice.

Evidence is offered by the defendants that the Secretary

Opinion filed Feb. 8, 1933

Mr. JUSTICE HUNTER DELIVERED THE OPINION OF THE COURT:

This is a joint appeal by the defendants from a judgment for $500.00 entered in the Municipal Court of Chicago against the defendants in a trover action. The amended statement of claim filed by the plaintiff in trover upon a promissory note in the principal sum of $500.00, signed by the Wylder Building Corporation and endorsed by the defendants, Charles S. Dow and Joe Dunkerly, two of the defendants, deny in an affidavit of merits that they were jointly liable with the Company Planning & Heating Company, a corporation. This denial is the affidavit of merits denied that it endorsed and delivered the note, or that it was jointly liable with the other defendants.

The court after a hearing, a jury having been waived, found the issues against the defendants and entered judgment for the amount appealed from.

The important question in this case is: Was the trial court in error in entering a joint judgment against the defendants when the note was offered by the plaintiff and received in evidence it appears from the statement of record that, for the purpose of the part, the appellants waived all errors affecting the issues in regard to presentation, dishonor and notice.

Evidence is offered by the defendants that the promissory

of State of Illinois issued a certificate of incorporation in March, 1930, under the corporate name of the Economy Plumbing & Heating Company. The incorporators, Charles M. Ross, Joe Kominsky and Sol R. Malkin, returned the charter, also a certificate under oath, as required by Chap. 32, Sec. 74, Cahill's Ill. Rev. Stats., 1931, that no stock was issued, no amount paid for the stock, and no debts incurred by this company. Just when this affidavit was filed does not appear in the record.

Evidence was also offered by the defendant, Economy Plumbing Co., that a corporate charter was received by it from the Secretary of State of the State of Illinois, bearing date August 4, A.D. 1930. The note was delivered to the plaintiff in May, 1930, endorsed Economy Plumbing & Heating Company, by Charles M. Ross, and the individual endorsements of Joe Kominsky and Charles M. Ross. The plaintiff's case is predicated upon liability by reason of the joint endorsement of the note in question by the defendants.

The reason given for the subsequent proceedings to again incorporate under the same name, the Economy Plumbing and Heating Company, is that there appeared to be some informality in the form of procedure to incorporate. Just what this informality was is not made clear. The endorsement of the note would indicate that the Economy Plumbing & Heating Company was in existence at the time of the endorsement by defendant Ross. The note was delivered and due, and in possession of the plaintiff at the time of the hearing. No defense was offered by the individual defendants.

The court in the case of Chadwick v. The Dieke Tool Co., 186, Ill. App. 376, upon the question involving the liability of a corporation, where the facts were somewhat similar to those in this case, said:

> * * * we think the corporation would be liable even if not then lawfully doing business in the corporate name, under the principles laid down in

of those of Illinois issued a certificate of incorporation in error, 1890, under the corporate name of the Economy Plumbing & Heating Company. The incorporators, Charles H. Moss, Joe Kennedy and Joel C. Bolster, received the charter, also a certificate under oath, as required by law. Id. Tr. 74, Public's Ill. Rev. Stats., 1901, that no stock was issued, no money paid for the stock, and no debts incurred by this company. Just when this affidavit was filed does not appear in the record.

Evidence was also offered by the defendants, "Economy Plumbing Co., that a corporate charter was received by it from the Secretary of State of the State of Illinois, bearing date August 4, 1890. The note was delivered to the plaintiff in May, 1890, executed Economy Plumbing & Heating Company, by Charles H. Moss, and the individual endorsements of Joe Kennedy and Charles H. Moss. The plaintiff's suit is predicated upon liability by reason of the joint endorsement of the note in question by the defendants.

The reason given for the endorsement preceeding to equip incorporate under the same name, the Economy Plumbing and Heating Company, is that there appeared to be some informality in the form of procedure to incorporate. Just what this informality was is not made clear. The endorsement of the note would indicate that the Economy Plumbing & Heating Company was in existence at the time of the endorsement by defendant Moss. The note was delivered and due, and in possession of the plaintiff at the time of the transfer. No defense was offered by the individual defendants.

The court in the case of Chadwick v. The State Trust Co., 111. App. 270, upon the question involving the liability of a corporation, where the facts were somewhat similar to those in this case, said:

" . . . as since the incorporation would be liable, even if not then legally doing business in the corporate name, under the principles laid down in

United States Exp. Co., v. Redbury, 54 Ill. 459, as follows: 'When an association of persons assume a name, which implies a corporate body, and exercise corporate powers, they should not be heard to deny that they are a corporation. When they do act and contract they are estopped from denying their corporate liability.'"

The defendant, the Economy Plumbing & Heating Company, was incorporated at the time of the delivery to the plaintiff of the promissory note that bore the endorsements of these defendants. The corporate powers were exercised when the name of the corporation was endorsed by its agent, and therefore the corporation is estopped at this time from denying liability; and further, the right to maintain an action by the plaintiff when, as in this case, suit is brought and service of summons had on the defendant within two years after the alleged dissolution of the defendant corporation. Such action by the plaintiff is provided for by Chap. 32, Para. 79, Sec. 79, Cahill's Ill. Rev. Stats. relating to corporations.

No defense having been offered by the individual defendants that would justify a reversal, the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON, P. J., and HALL, J, CONCUR.

United States v. Co., v. Lindner, 26 Ill. App. 4d, 4d 1 (1924). "This is consistent of provide common a case, which implies a corporate body, and wherein corporate power, they should not be held to be that they are a corporation. Then they do not exercise their corporate powers, they are acting from duplicity their corporate identity."

The district, the Lawsuit Plaintiff's Attorney, Tempney, was incompetent at the time of the delivery to the plaintiff of the promissory note that bore the endorsements of these defendants. The corporate power was exercised when the name of the corporation was endorsed by its agent, and therefore the corporation is entitled at this time from Keeping SUBSTITUTE THE PRESENT, its right to make-bale or action by the plaintiff. Then, in this case, that is through the service of summons but on the defendant at this the place the (Signed signature) of the defendant corporation. Such action by the plaintiff is provided for by Chap. 22, Secs. 70, one, 70, Smith's Ill. Ann. Stats. relating to corporations.

In defense having been offered by the individual defendants that would justify a verdict, the judgment is affirmed.

Judgment affirmed.

CLARK, P. J., and ELIL, J., concur.

36332

P. W. BAUMAN,

(Plaintiff) Appellee,

v.

C. I. T. CORPORATION, a corporation,

(Defendant) Appellant.

THE PEOPLE OF THE STATE OF ILLINOIS, on the relation of C. I. T. Corporation, a corporation, Relator,

v.

JOHN H. LYLE, Judge of the Municipal Court of Chicago.

) APPEAL FROM
) MUNICIPAL COURT
) OF CHICAGO.

Opinion filed Feb. 8, 1933

OPINION PER CURIAM:

The petitioner, the people of the State of Illinois on the relation of the C. I. T. Corporation, filed a petition for a writ of mandamus in aid of a proceeding then pending in the Appellate Court, wherein P. W. Bauman was (Plaintiff) appellee, and C. I. T. Corporation was (defendant) appellant, and that a writ issue commanding John H. Lyle, a judge of the Municipal Court of Chicago, to attach a certificate in the form set forth in the petition and attach his signature as the judge presiding in the Municipal Court of Chicago in the above entitled cause. To this petition the respondent appeared and filed his answer in this court, which answer was demurred to by the relator.

The record filed in this court contains a bill of exceptions, to which is attached a purported certificate signed by the respondent as a judge of the Municipal Court of Chicago, and is in words and figures as follows:

> "Forasmuch as two transcripts of the record have been presented to the court, both alleging to be correct and the counsel for defendant and for plaintiff being unable to agree concerning inaccuracies alleged by counsel for the plaintiff, the court hereby submits the two copies of said transcripts of record and certifies that so far as the court is able to determine this transcript of the record submitted

Opinion filed Feb. 8, 1933

> by the defendant appears to be a correct statement of the facts and proceedings of the case and of all questions of law involved in said case and the decisions of the Court upon all such questions of law."

The bill of exceptions so certified, was stricken by this court upon a motion of the plaintiff, appellee in the original proceedings.

This proceeding is for the purpose of directing the respondent to attach and sign a certificate in the usual form, which is set forth in the petition in this proceeding, so that the relator's rights may be preserved to fully present the questions raised upon its appeal.

The bill of exceptions as prepared and signed was filed with the Clerk of the Municipal Court. The time for signing by the respondent has long since expired, and the writ of mandamus would compel respondent to sign and order filed a bill of exceptions having a different certificate of the judge who was then presiding from that already filed with the Clerk of the Municipal Court.

In a mandamus proceeding somewhat similar to the proceeding before this court, the Appellate Court in the case of People ex rel v. Perdue, 99 Ill. App. 289, said:

> "To the answer a demurrer is interposed. The only act required by respondent to make the bill of exceptions complete was to attach his seal to them. After having once signed and lodged the bill of exceptions with the County Clerk respondent could not, after the time for presenting the same had expired, be compelled to sign and seal other and different bills of exception. Nor could he be compelled to sign and seal copies of the ones already signed."

The order of the court will be that the demurrer of the relator to the answer of the respondent is overruled. The answer to the petition being complete, the issuance of a writ of mandamus as prayed for in the petition by the relator is denied.

WRIT OF MANDAMUS DENIED.

or the defendant appears to be a proper defendant at the facts and proceedings of the case and of all questions of law involved in said case and the decisions of the Court upon all such questions of law."

The bill of exceptions so certified, was stricken by this court upon a motion of the plaintiff, appellee in the original proceeding.

This proceeding is for the purpose of directing the respondent to attach and sign a certificate in the usual form, which is not true in the petition in this proceeding, so that the relator's rights may be preserved to fully present the questions raised upon its appeal.

The bill of exceptions as presented and signed was filed with the Clerk of the Municipal Court. The time for signing by the respondent has long since expired, and the writ of mandamus would compel respondent to sign and order filed a bill of exceptions having a difference certificate of the judge who was then presiding from that already filed with the Clerk of the Municipal Court.

In a mandamus proceeding somewhat similar to the proceeding before this court, the Appellate Court in the case of Jessie ex rel v. Darling, 96 Ill. App. 599, said:

"To the answer a demurrer is interposed. The only ver requires the respondent to make the bill of exceptions complete and to attach his seal to them. After having once signed and looked the bill of exceptions with the County Clerk respondent could not, after the time for presenting the same had expired, be compelled to sign and seal other and different bills of exceptions. Nor could he be compelled to sign and seal copies of the same already signed."

The order of the court will be that the demurrer of the relator to the answer of the respondent is overruled. The answer to the petition being complete, the issuance of a writ of mandamus as prayed for in the petition by the relator is denied.

Writ of mandamus denied.

36016

68 H

MARY KAZETA,
Defendant in Error,

v.

SYLVESTER NORMAN,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

269 I.A. 652

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Mary Kazeta sued Harry Charples and Sylvester Norman in case. There was a trial before the court with a jury and at the conclusion of plaintiff's evidence the suit was dismissed as to defendant Charples. There was a verdict returned finding defendant Norman guilty and fixing plaintiff's damages at the sum of $8,750. Defendant Norman has sued out this writ of error to reverse the judgment entered upon the verdict.

The amended declaration consisted of three counts. The first count charges that on November 6, 1930, defendant Norman owned and operated an automobile taxicab used for the carrying of passengers for hire and that plaintiff was a passenger for hire in the said taxicab; that the same was then and there being driven by defendant Norman in a westerly direction on 35th street at Michigan boulevard, in Chicago; that there was another automobile being driven in a southerly direction on Michigan boulevard by defendant Harry Charples; that it was the duty of defendant Norman to exercise the highest degree of care for the safety of plaintiff consistant with the practical operation of the business and that he did not observe his duty in that behalf but carelessly and negligently operated, controlled and managed the said taxicab, and as a direct and proximate result thereof plaintiff was seriously injured as a result of a collision between said taxicab and the

[illegible]

MARY KAMPF,
Defendant in Error,

v.

GRAYSON DUNMAN,
Plaintiff in Error.

ERROR TO DOUGLAS COUNTY
OF OMAHA COURT.

MR. JUSTICE DUFFIE DELIVERED THE OPINION OF THE COURT.

Mary Kampf and Harry Dunphie and Lydwalter Dunman
in error. There was a trial before the court with a jury and
at the conclusion of plaintiff's evidence the suit was dismissed
as to defendant Dunphie. There was a verdict rendered finding
defendant Dunman guilty and fixing plaintiff's damages at the sum
of $4,750. Defendant Dunman has moved out this suit of error to
reverse the judgment entered upon the verdict.

The amended declaration consisted of three counts. The
first count charges that on November 6, 1930, defendant Dunman
owned and operated an automobile hackney used for the conveying
of passengers for hire and that plaintiff was a passenger for hire
in the said hackney; that the same was then and there being driven
by defendant Dunman in a negligent manner on 24th street at
Douglas Boulevard. In Count Two there was another automobile
being driven in a negligent manner on Eighteen Boulevard by
defendant Harry Dunphie; that it was the duty of defendant Dunman
to provide the Eighteen Degree at such for the safety of plaintiff
consistent with the practical operation of the business and that
he did not observe his duty in that behalf but negligently and
carelessly operated, controlled and managed the said hackney, and
as a direct and proximate result thereof plaintiff was violently
injured as a result of a collision between said hackney and the

automobile of defendant Sharples, and that plaintiff was in the exercise of due care and caution for her own safety at and just prior to the occurrence in question. The second count charges that it was the duty of defendant Norman, in the exercise of the highest degree of care consistent with the practical operation of his taxicab business, and in the operation and control of his taxicab, to so operate and drive the said taxicab as not to cause harm or injury to plaintiff, who was then and there riding as a passenger therein; that there were traffic signal lights at the aforementioned intersection, located, situated and built by the authority of the city of Chicago, being stop and go lights for traffic at said intersection, which said lights were then and there operating and functioning at certain intervals for direction of traffic; that the said lights were lit red for east and west traffic at and immediately prior to the occurrence in question and that defendant Norman carelessly, negligently and improperly failed to bring his taxicab to a stop before entering into Michigan avenue, and failed to heed the signal lights that were then and there functioning against east and west traffic, and as a result of his said negligence there was a collision and plaintiff was injured. The third count charges that it was the duty of defendant Norman to drive the taxicab at a rate of speed which was reasonable and proper having regard to the traffic and the use of the way and so as not to injure plaintiff, and that defendant, on the contrary, so carelessly, negligently and improperly operated and drove his said taxicab at a rate of speed greater than was reasonable and proper having regard to the traffic and the use of the way, namely, 35 miles an hour, as a direct and proximate result of which excessive rate of speed and negligence of defendant, there was a collision and plaintiff was injured. Defendant pleaded the general issue to the declaration.

responsible of defendant Sharples, and that plaintiff was in the exercise of due care and caution for her own safety at and just prior to the occurrence in question. The second count charges that it was the duty of defendant Sharples, in the operation of the Ford sedan of such construction with the practical operation of his Ford truck thereon, and in the operation and control of his truck, to so operate and drive the said truck as not to cause harm or injury to plaintiff, who was then and there riding on a passenger thereof that there were traffic signal lights at the aforementioned intersection, located, situated and built by the authority of the city of Chicago, being stop and go lights for traffic at said intersection, which said lights were then and there operating and functioning at certain intervals for direction of traffic; that the said lights were for east and west traffic at and immediately prior to the occurrence in question and were defendant Sharples negligently and improperly failed to bring his truck to a stop before entering into Michigan Avenue, and failed to heed the signal lights that were then and there functioning against east and west traffic, and as a result of his said negligence there was a collision and plaintiff was injured. The third count charges that it was the duty of defendant Sharples to drive the truck at a rate of speed sufficient reasonable and proper having regard to the traffic and the use of the way and so as not to injure plaintiff, and that defendant, on the occasion, as aforesaid, negligently and improperly operated and drove his said truck at a rate of speed greater than was reasonable and proper having regard to the traffic and the use of the way, namely, 35 miles an hour, as a direct and proximate result of which excessive rate of speed and negligence of defendant, there was a collision and plaintiff was injured. Defendant pleaded the general issue to the declaration.

Plaintiff was 20 years old, single, and boarding with a family in Chicago. Her home town is Auburn, Illinois. She had been living in Chicago for three years, was working as a waitress, and her income at the time from her wages and tips averaged between $20 and $25 a week. Prior to the accident she enjoyed excellent health and was regularly employed. On the evening of November 6, 1930, she, with a friend from her home town, were visiting some friends at 49th street and Cottage Grove avenue, who were giving a party that evening, and plaintiff and her friend did not leave for home until about 2:30 a. m. As they left they hailed a passing cab, got into it and gave instructions to the driver, defendant Norman, as to the address of their boarding house. The testimony for plaintiff is to the effect that from the time that plaintiff became a passenger until the accident the cab was driven very fast. The partition window in the taxicab that separates the part of the same reserved for passengers and the seat of the driver, was open. The taxicab was being driven in a westerly direction on 35th street and when it reached Michigan avenue it collided with the automobile of defendant Sharples, which was being driven south on that avenue. Both plaintiff and her friend testified that the taxicab was going very fast just before the accident and that it did not stop at the intersection of 35th street and Michigan avenue. Sharples, who testified for plaintiff, stated that just before the accident he was driving south on Michigan avenue at a speed of about 25 miles an hour, and that as he reached 35th street the traffic signal lights at this intersection were functioning and the north and south traffic had a green light showing in his favor; that he was proceeding across the intersection and while the green light was still in his favor "the taxicab suddenly flashed out on me. * * * I couldn't observe the miles per hour, but the cab was coming at a pretty good speed; * * * the cab kind of

Plaintiff was 20 years old, single, and boarding with a family in Chicago. Her home town is Auburn, Illinois. She had been living in Chicago for three years, was working as a waitress, and her income at the time from her wages and tips averaged between $20 and $25 a week. Prior to the accident she enjoyed excellent health and was regularly employed. On the evening of December 6, 1951, she, with a friend from her home town, was visiting some friends at 4924 Almond and Indiana Street Chicago, who were giving a party that evening, and plaintiff and her friend did not leave for home until about 2:30 a. m. As they left they noticed a parking cab, got into it and gave instructions to the driver, defendant Kenson, as to the address of their boarding house. The testimony for plaintiff is to the effect that from the time plaintiff became a passenger until the accident the cab was driven very fast. The partition window in the backed that separates the part of the cab reserved for passengers and the seat of the driver, was open. The backed was being driven in a westerly direction on 26th street and when it reached Michigan avenue it collided with the automobile of defendant Shurpler, which was being driven south on that avenue. Both plaintiff and her friend testified that the backed was going very fast just before the accident and that it did not stop at the intersection of 26th street and Michigan avenue. Shurpler, the witness for plaintiff, stated that just before the accident he was driving south on Michigan avenue at a speed of about 30 miles an hour, and that as he reached 26th street the traffic signal lights at this intersection were functioning and the north and south traffic had a green light showing in his favor. That as the proceeding across the intersection and while the green light was still in his favor "the backed suddenly flashed out on me. * * * I instinctively sounded the signal horn, but the cab was coming at a pretty good speed. * * * the cab side of

turned south and I turned west and we piled up together on the southwest corner there." He further testified that the front and left side of his car were damaged by the impact or "sideswipe;" that he had just got past the sidewalk on the north side of 35th street when the taxicab flashed out in front of him, going fast, and that at the instant of the impact the green light was still in his, Sharples', favor, and he swung his car quickly to his right and defendant swung his taxicab to his left; that the taxicab went over the curb and the sidewalk, and smashed against the building at the southwest corner and then turned over; that after the accident the taxicab was about "half the length of the courtroom" west of the corner, up against the building, and turned upside down with the wheels in the air. Sharples, a milk wagon driver, testified that he was in no hurry at the time as the following morning "was his day off." Norman was the sole witness in his behalf. He testified that when he got to 35th street and Michigan avenue he looked each way before crossing over; that he saw a car coming that seemed to be about a block away; that he was traveling about 20 miles an hour and had the green light in his favor when he reached the intersection; that the automobile of Sharples was coming down Michigan avenue "about 40 miles an hour. It didn't slacken speed or stop or anything;" that during the entire trip he, Norman, was going "about 20 and not over 23 miles an hour." On cross-examination he testified that he did not stop for the intersection, "just slowed up, before I proceeded to cross. * * * I was going about 30 miles an hour when I approached, and cut down the speed as I crossed. * * * As I started to cross I saw this machine coming south on Michigan avenue about half a block away; * * * when I got to the boulevard I began to pick up speed. He was about a half a block away coming pretty fast, about 40 miles an hour. I tried to avoid the accident by getting out of the way to keep from getting hit.

turned north and I drove west and we piled up together on the westbound motor there." Mr Durkin recalled that the lower and left side of his car were damaged by the impact or "sideswipe" that he had just got back the license on the north side of 86th street when the Swedish Flamboe got in front of him, going east, and that at the instant of the impact the green light was still in his favor, and he swung his car quickly to his right and deflected some his traffic so his left; that the truck went over the curb and the sidewalk, and smashed against the walls of his business house and then veered away; that after it's impact the truck was drive in the air. Charles, a milk wagon driver, testified that he was in no hurry at the time of the collision running "was his day off." Farmer was the male witness in his behalf. He testified that when he got to 35th street and Michigan avenue he looked each way before crossing every time he saw a car coming that seemed to be about a block away; that he was travelling about 20 miles an hour and had the green light in his favor when he approached the intersection; that the unexpectedly of Charles car coming from Michigan avenue "shook up quite an hour. It didn't [illegible] as much as surprising" that having the white car, Charles, was going to take Mr Ed and get out to allen an hour." Mr Farmer remembered he testified that he did not stop for the intersection, "just slowed up, before I proceeded to cross. * * * I was going about 20 miles an hour when I approached, and then then the speed was I crossed. * * * If I stopped he would be gone; I was this waiting coming south on Michigan avenue about half a block away * * * when I got to the intersection I began to pick up speed. He was about a half a block away; coming pretty fast, about 35 miles an hour. I tried to avoid the accident by getting out of the way to keep from getting hit.

accident

I don't remember what part of the intersection I was in when I took my foot off the brake and started to speed up;" that his car was turned over against the building on the 35th street side; that he did not know exactly how far west of Michigan avenue his taxicab was after the collision, but that "it was clear of the west corner on 35th street."

Defendant contends that "the preponderance of the evidence is in favor of the defendant." After a careful examination of the entire evidence we are satisfied that there is no merit in this contention.

Defendant next contends that "plaintiff was guilty of contributory negligence." In support of this contention defendant argues that as plaintiff admitted on cross-examination that she thought that the cab was going so fast that it was dangerous, and that as the glass window between her and the driver was open "she could have spoken to the driver and failed to do so, she should be held to account for her contributory negligence." In Metz v. Yellow Cab Co., 242 Ill. App. 609 (certiorari denied by the Supreme court), wherein the same contention was raised, we said (pp. 614-5):

"The defendant cites in support of its contention the rule announced in Pienta v. Chicago City R. Co., 234 Ill. 246, 259. Neither in that case nor in any of the others cited was the plaintiff a passenger of a common carrier. In the Pienta case the plaintiff was riding on a wagon, the driver of which turned the wagon into a street railroad track upon which a street car was approaching, and the plaintiff was injured as the result of a collision between the car and the wagon and it was held that it was the duty of a passenger in a vehicle, where he has an opportunity to learn of approaching danger and avoid it, to warn the driver of the vehicle of such danger, as he has no right, because some one else is driving the vehicle, to omit reasonable and prudent efforts on his part to avoid the danger. Our Supreme Court has never applied this rule to a common carrier and passenger case, but even if it could be fairly argued that the rule in the Pienta case controls such a case, nevertheless, under the uncontroverted facts bearing upon the instant accident, there was no approaching danger for the plaintiff, in the exercise of ordinary care, to learn of, and no opportunity for the plaintiff, in the exercise of ordinary care, to do anything to prevent the driver of the cab from bringing about the collision. It is elementary law that the degree of care which a plaintiff in a given case is bound to exercise will be found to depend upon the

I don't remember what part of the intersection I was in when I took my foot off the brake and shouted to speed up" that his car was turned over against the building on the 12th street side; that he did not know exactly how far west of Michigan avenue his trackmen are after the collision, but that "it was close of the west corner on 12th street."

Defendant contends that "the preponderance of the evidence is in favor of the defendant." After a careful consideration of the entire evidence we are satisfied that there is no merit in this contention.

Defendant next contends that "plaintiff was guilty of contributory negligence." In support of this contention defendant argues that as plaintiff testified on cross-examination that she thought that the cab was going so fast that it was dangerous, and that as the glass window between her and the driver was open "she could have spoken to the driver and failing to do so, she should be held to account for her contributory negligence." In Beck v. Yellow Cab Co., 248 Ill. App. 402 (modified and affirmed by the Supreme Court), wherein the same contention was raised, we said (pp. 414-5):

"The defendant also is guilty of the contention the plaintiff assumed in Illinois v. Illinois City R. Co., 264 Ill. 164, that, without in that case and in any of the others cited, was the plaintiff a passenger of a common carrier. In the Illinois case the plaintiff was riding on a wagon, the driver of which turned the wagon into a street railroad track upon which a street car was approaching, and the plaintiff was injured as the result of a collision between the car and the wagon and it was held that it was the duty of a passenger in a vehicle, where he has no opportunity to learn of approaching danger and avoid it, to warn the driver of the vehicle of such danger, so he has no right, because such one also is driving the vehicle, to wait incautiously and produce efforts on the part to avoid the danger. The Illinois Court has more recently applied this rule to a common carrier and passenger case, but even if it could be fairly argued that the case in the Illinois case involving such a case, nevertheless, under the uncontroverted facts bearing upon the instant controversy, there was no opportunity danger for the plaintiff, in the exercise of ordinary care, to learn of, and an opportunity for the plaintiff, in the exercise of ordinary care, to do anything to prevent the collision of the cab with the street car, the collision. It is elementary law that the degree of care which a plaintiff in a place and in the same situation will be found to depend upon the

relative rights or position of the parties at the time the injury complained of happened, and that a passenger of a common carrier is not obliged, in the exercise of ordinary care, to anticipate negligence on the part of the carrier; that if he assumes the carrier will not be negligent and acts accordingly, he will not, for that reason alone, be negligent. Certainly it is not the law that a passenger of a common carrier must be constantly on the qui vive to prevent a servant of the carrier from acting carelessly in the management of a train, street car or cab. The observance of such a rule of law would place upon a passenger an intolerable and highly unjust burden and would only tend to hinder and annoy the servant of the carrier in his control of the train, street car or taxicab, and tend rather to cause, than to prevent, an accident."

We adhere to what we there said. In the instant case plaintiff testified that she and her friend "were talking quite loud about his going so very fast," but upon motion of defendant this evidence was stricken. On cross-examination the witness stated that she knew the driver was going fast and that she and her friend "were commenting on it," but that the driver went right along; that they were talking about how fast the defendant was driving. "Q. And during all of this time you were talking about the speed of the taxicab? A. Yes, sir. Q. You didn't by any chance call out to the man out in front to ease up or slack up, or anything of that sort? A. No, but we talked quite loud. * * * Q. By the way, did you sit in front of the open window which opened into the driver's seat, or did your friend sit there? A. I did. * * * Q. And the driver's seat was only a matter of three or four feet in front of you from where you sat? A. Yes, sir." Upon redirect the following occurred: "Q. Will you tell this jury, Miss Kazeta, why you didn't address the driver about the speed, personally? Mr. Bloomingston (attorney for defendant): I object to that. The Court: Yes, objection sustained as to why she didn't." Elizabeth Mack, who was in the cab with plaintiff, testified as to the speed of the cab and that she and plaintiff were frightened by it, "so we naturally spoke a little louder thinking he might hear us regarding the speed." But this entire answer, on motion of defendant, was stricken. From the attitude of defendant during the trial,

[illegible] violation. From the witness at defendant testing the brake, [illegible] ing the speed." But this notice seemed, on notice of defendant, [illegible] ve notice it, simply a little longer. Certainly he might have be negligent. The [illegible] of the out and back and plaintiff was injured by it, "we [illegible] that, the speed was in the job with plaintiff, testified as to the speed [illegible] Yes, objection sustained as to why who driven." Eisenbach [illegible] Cross-examination (continued): I objected to time. The [illegible] 'Yes' I said to the driver about the speed, personally. Mr. [illegible] driver's attorney about the speed." Mr. [illegible] Yes, sir." Upon cross-examination [illegible] assumed. "Q. Will you call this jump, Miss Kaneko, why you [illegible] you from there you not? A. Yes, sir." Upon cross-examination the testimony [illegible] driver's mark was only a matter of three or four feet in front of [illegible] mark, or did your friend ask about? A. I did. * * * Q. And the [illegible] you sit in front of the open window which opened into the driver's [illegible] mark? A. Yes, sir. Q. Yes, sir." Upon redirect the testimony [illegible] the driver was driving." Q. And [illegible] during all of this time you were talking about the speed of the [illegible] mark? A. Yes, sir. Q. Yes sir." Upon recross-examination [illegible] the car was in front to come up or slack up, or anything of that [illegible] nature? A. No, but we talked quite loud. * * * Q. Why the way, did [illegible] you sit in front of the open window which opened into the driver's [illegible] seat, or did your friend ask about? A. I did. * * * Q. And the [illegible] driver's mark was only a matter of three or four feet in front of [illegible] you from there you not? A. Yes, sir." Upon redirect the testimony [illegible] assumed. "Q. Will you call this jump, Miss Kaneko, why you [illegible] kind's attorney about the speed, personally? Mr. [illegible] Eisenbach (continued): I objected to time. The [illegible] Court: Yes, objection sustained as to why who driven." Eisenbach [illegible] was in the job with plaintiff, testified as to the speed [illegible] of the out and back and plaintiff was injured by it, "we [illegible] notice it, simply a little longer. Certainly he might have be negligent. [illegible] ing the speed." But this notice of defendant, simply [illegible] violation. From the witness at defendant testing the brake,

it would appear that he is hardly in a position to now urge that plaintiff failed to protest to defendant as to the speed of the taxicab; but in any event we think there was sufficient evidence from which the jury might reasonably find that defendant knew that plaintiff and her friend were frightened by the speed of the taxicab and desired defendant to moderate the same.

Defendant is a colored man and he argues that because plaintiff testified that she did not know until she entered the cab that he was a colored man, she thereby sought to give the impression to the jury "that driving behind a colored chauffeur was something fraught with unusual danger or menace to her." After a careful examination of the record we find this contention to be without the slightest merit. During the examination of Miss Mack the following occurred: "Q. Tell the court and jury how the cab proceeded to go with reference to speed after you commenced on your journey home. A. It was going fast and Mary and I were frightened, too frightened to say anything to him. Mr. Bloomingston: I ask that be stricken out. The Court: No, it may stand." Defendant argues that his motion to strike should have been granted because the jury might have assumed from the answer that the witness meant that she and plaintiff were too frightened to speak to the driver because he was a colored man. This far-fetched argument, plainly an afterthought, is without the slightest merit. It will be noted that the part of the answer as to the speed of the cab was responsive and competent and that defendant's motion was that the entire answer be stricken. If at the time he made the motion the able counsel for defendant thought that the answer was prejudicial, he failed to so apprise the court. Moreover, the court instructed the jury "that the fact that the defendant Sylvester Norman is a colored man should not in any way be prejudicial against him, and you should give him as fair and impartial trial as you would give him if he

it would appear that he is hardly in a position to say more than plausibly failed to present a defendant as to the speed of the taxicab; but in any event we think there was sufficient evidence from which the jury might reasonably find that defendant knew that plaintiff and her friend were frightened by the speed of the taxicab and neither defendant to motorists the same.

Defendant is a salaried man and he argues that because plaintiff testified that she did not know until she entered the cab that he was a salaried man, the charge sought to give the impression to the jury "that driving behind a salaried executive was something fraught with unusual danger or menace to her." After a careful examination of the record we find this assertion to be without the slightest merit. During the examination of Miss Mack the following occurred: "Q. Tell the court and jury how you had proceeded to go with reference to speed after you commenced on your journey home. A. It was going fast and Mary and I were frightened, too frightened to say anything to him. Mr. Blumenfeld: I ask that be stricken out. The Court: No, it may stand." Defendant argues that his motion to strike should have been because the jury might have assumed from the answer that the witness meant that she and plaintiff were too frightened to speak to the driver because he was a salaried man. This far-fetched argument, plainly an afterthought, is without the slightest merit. It will be noted that the part of the answer as to the speed of the cab was responsive and competent and that defendant's motion was that the entire answer be stricken. If at the time he made the motion the judge sustained for argument sought that the answer was prejudicial, he failed to so advise the court. Moreover, the court instructed the jury "that the fact that the defendant Gravelor Tucson is a salaried man should not in any way be prejudicial against him, and you should give him as fair and impartial trial as you would give one if he

were a white man. Colored men are entitled to the same fair trial in the courts of law as white men."

Defendant complains of one of the instructions given to the jury at the instance of plaintiff, but we find no substantial merit in the point.

Defendant further contends that "the verdict is excessive." The jury awarded plaintiff $8,750. We have given considerable consideration to this contention and after a very careful examination of all the evidence bearing upon the alleged damages sustained by plaintiff we have reached the conclusion that $5,000 would be a fair compensation to plaintiff for the injuries and damages she sustained. Accordingly, if within ten days plaintiff files in this court a remittitur of $3,750, the judgment against defendant will be affirmed for $5,000, otherwise it will be reversed and the cause remanded to the Superior court of Cook county for another trial.

JUDGMENT AFFIRMED FOR $5,000 UPON REMITTITUR OF $3,750; OTHERWISE JUDGMENT REVERSED AND CAUSE REMANDED FOR ANOTHER TRIAL.

Gridley, J., concurs.

were a white man. Colored men are included in the term "all trial in the course of law as white men."

Defendant complains of one of the instructions given to the jury as the measure of plaintiff's, but we find no substantial merit in the point.

Defendant further contends that "the verdict is excessive." The jury awarded plaintiff $8,000. We have given considerable consideration to this contention and after a very careful examination of all the evidence bearing upon the alleged damages sustained by plaintiff we have reached the conclusion that $8,000 would be a fair compensation to plaintiff for the injuries and damages sustained. Accordingly, if within ten days plaintiff files in this court a remittitur of $2,000, the judgment against defendants will be affirmed for $6,000; otherwise it will be reversed and the cause remanded to the superior court of Cook county for another trial.

REMITTITUR FILED FOR $6,000 AND JUDGMENT AFFIRMED ON $6,000; OTHERWISE JUDGMENT REVERSED AND CAUSE REMANDED FOR ANOTHER TRIAL.

Mr. Justice Scott, dissenting.

35085

JOE MICHELOTTI,

Plaintiff - Appellee,

v.

H. W. ELMORE & CO., an Illinois Corporation,

Defendant- Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

Opinion filed Feb. 8, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This case comes before this court upon an appeal by the defendant from a judgment for $2,034.01, entered by the court in favor of the plaintiff upon a hearing without a jury. The action is based upon the common counts. The defendant filed a plea of the general issue, together with an affidavit of merits, denying that the defendant was indebted to the plaintiff. On March 20, 1926, the plaintiff entered into a preliminary agreement, signed by the plaintiff and approved by H. W. Elmore, for the purchase of real estate therein described and upon the terms set forth. Thereafter, the plaintiff, as the second party entered into a contract, which was introduced in evidence by the plaintiff, bearing the date hereinbefore set forth, wherein the first party is designated as Elmore's Morningside Park Realty Trust, of which the Continental and Commercial Trust and Savings Bank is trustee. This contract provides for the purchase by the plaintiff of certain real estate described, at a price of $5250, and is signed and sealed by the plaintiff, and is also signed, "Elmore's Morningside Park Realty Trust, of which the Continental and Commercial Trust and Savings Bank is Trustee, By H. W. Elmore, Manager."

There is evidence by the plaintiff of the amounts paid under the terms of the contract herein described. The defendant offered in evidence the Articles of Incorporation of the defendant, the preliminary receipt, previously mentioned, signed by the plaintiff

Term

No. 41,147.

Plaintiff - Appellee,

v.

H. P. Elmore & Co., an Illinois Corporation,

Defendant - Appellant.

Appeal from

Superior Court

Cook County.

Opinion filed Feb. 8, 1933

Mr. JUSTICE MORAN delivered the opinion of the court.

This case comes before this court upon an appeal by the defendant from a judgment for $8,000.00, entered on the docket in favor of the plaintiff upon a hearing without a jury. The action is based upon the common counts. The defendant filed a plea of the general issue, together with an affidavit of merits, denying that the defendant was indebted to the plaintiff. On March 20, 1928, the plaintiff entered into a preliminary agreement, signed by the plaintiff and approved by H. P. Elmore, for the purchase of real estate therein described and upon the terms set forth. Thereafter, the plaintiff, as the second party entered into a contract, which was introduced in evidence by the plaintiff, bearing the date hereinbefore set forth, wherein the first party is designated as Elmore's Morningside Park Realty Trust, of which the Continental and Commercial Trust and Savings Bank is trustee. This contract provides for the purchase by the plaintiff of certain real estate described, at a price of $2250, and is signed and sealed by the plaintiff, and is also signed, "Elmore's Morningside Park Realty Trust, of which the Continental and Commercial Trust and Savings Bank is Trustee, By H. P. Elmore, Manager."

There is evidence by the plaintiff of the amounts paid under the terms of the contract herein described. The defendant offered in evidence the articles of Incorporation of the Interstate, the preliminary receipt, previously mentioned, signed by the plaintiff

and approved by H. W. Elmore. The defendant also offered in evidence certain documents which, upon objection by the plaintiff, were not received in evidence. The documents were a deed of trust executed by Samuel J. Lumbard and Louise S. Lumbard, his wife, conveying the property described in the contract, together with other property, to the Continental and Commercial Trust and Savings Bank, as Trustee, dated the 17th day of February, 1926, a trust agreement dated the same day by which the Continental and Commercial Trust and Savings Bank certified that it was taking title to the property described in the deed, in trust, that it was holding it for the benefit of Howard W. Elmore and Samuel J. Lumbard, and that it would deal with said property under the direction of said parties.

The defendant also offered an agreement between Howard W. Elmore and Samuel J. Lumbard, which agreement provided for the sale by Elmore of the property conveyed to the Continental and Commercial Trust and Savings Bank, as trustee. At the close of the hearing the court found the issues for the plaintiff and entered judgment for the amount above set forth.

The defendant questions the ruling of the trial court in its refusal to admit the documents previously mentioned and offered by the defendant, and contends that such ruling is reversible error; that the court erred in its refusal to receive the documents offered by the defendant to show, by the offered evidence, the identity of the persons who entered into the contract under a business or trade name. Permitting evidence to identify persons composing a firm, is admissible and does not violate the rule that evidence is not admissible to contradict, aver, vary or alter the terms of a written document. This evidence is competent to show the real vendors in the agreement in the instant case who have adopted and are doing business as the Elmore's Morningside Park

and approved by H. E. Elmore. The defendant also offered in evidence certain documents, upon objection by the plaintiff, were not received in evidence. The documents were a deed of trust executed by Samuel J. Lambert and Louise E. Lambert, his wife, conveying the property described in the contract, together with other property to the Continental and Commercial Trust and Savings Bank, as Trustee, dated the 17th day of February, 1922, a trust agreement dated the same day by which the Continental and Commercial Trust and Savings Bank certified that it was taking title to the property described in the deed, in trust, that it was holding it for the benefit of Howard E. Elmore and Samuel J. Lambert, and that it would deal with said property under the direction of said parties.

The defendant also offered an agreement between Howard E. Elmore and Samuel J. Lambert, which agreement provided for the sale by Elmore of the property conveyed to the Continental and Commercial Trust and Savings Bank, as trustee. At the close of the hearing the court found the issues for the plaintiff and entered judgment for the amount above set forth.

The defendant questions the ruling of the trial court in its refusal to admit the documents previously mentioned and offered by the defendant, and contends that such ruling is reversible error; that the court erred in its refusal to receive the documents offered by the defendant to show, by the offered evidence, the identity of the persons who entered into the contract under a business or trade name. Permitting evidence to identify persons composing a firm, is admissible and does not violate the rule that evidence is not admissible to contradict, aver, vary or alter the terms of a written document. This evidence is competent to show the real vendors in the agreement in the instant case who have adopted and are doing business as the Elmore's Kornkiggerie Park

Realty Trust, of which the Continental and Commercial Trust and Savings Bank is Trustee.

At the request of the parties to this appeal, this court has withheld its opinion until the announcement of the Supreme Court's opinion in the case of Belin v. Krenn & Dato, 350 Ill. 284. This opinion disposes of the questions as to the admissibility of such evidence as was offered by the defendant in the instant case, and rules, in effect, that such evidence is admissible, and that it is competent to show the real parties in interest doing business under an adopted or business name. Applying the ruling announced in the opinion just mentioned, it was error for the trial court to refuse to receive the evidence offered by the defendant, and accordingly the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED

WILSON, P.J. AND HALL, J. CONCUR.

Deeply Trust, of which the Continental and Commercial Trust and Savings Bank is Trustee.

At the request of the parties to this appeal, this court has withheld its opinion until the announcement of the Supreme Court's opinion in the case of Smith v. Kazen & Roth, 280 Ill. 284. This opinion disposes of the questions as to the admissibility of such evidence as was offered by the defendant in the instant case, and rules, in effect, that such evidence is admissible, and that it is competent to show the real parties in interest doing business under an adopted or business name. Applying the ruling announced in the opinion just mentioned, it was error for the trial court to refuse to receive the evidence offered by the defendant, and accordingly the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

WILSON, P.J. AND HALL, J. CONCUR.

35639

AMY SCHAVER, Administratrix of the Estate of HOWARD SCHAVER, Deceased,	)	WRIT OF ERROR
Plaintiff in Error,	)	
v.	)	TO CIRCUIT COURT
DR. WALTER RENDTORFF and DR. CHARLES M. FOX,	)	
Defendants in Error.	)	COOK COUNTY.

269 I.A. 651

Opinion filed Feb. 8, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an action by Amy Schaver, Administratrix of the Estate of Howard Schaver, deceased, to recover damages resulting from negligence in the treatment, both medically and surgically of the deceased by the defendants, Dr. Walter Rendtorff and Dr. Charles M. Fox. The case was tried before the court and a jury, and at the close of the plaintiff's case the court, at the request of the defendants, instructed the jury to find the defendants not guilty, and entered a judgment upon the verdict, from which judgment the plaintiff prosecutes a writ of error.

It appears from the evidence that about May 9, 1927, Dr. Walter Rendtorff, the family physician of the plaintiff's intestate, Howard Schaver, was called to attend the deceased in his lifetime. After a physical examination by the doctor, the patient was taken to the Oak Park Hospital for treatment. Dr. Rendtorff called Dr. Charles M. Fox, who was also made a party defendant, and after a consultation, Dr. Fox operated upon the patient, Howard Schaver, and removed his appendix. The operation was performed in the presence of Dr. Rendtorff. Dr. Fox was assisted in the operation by hospital internes and nurses assigned to duty in the operating room by the hospital authorities. The Oak Park Hospital, where the operation was performed by the doctor, is considered a Class A hospital, with accepted modern equipment. After the operation on the patient Howard Schaver, he remained at the Oak Park Hospital,

[illegible]

[illegible] Administrator of the
Estate of [illegible], Deceased,

Plaintiff in Error,

v.

[illegible] and [illegible],
[illegible] vs.

Defendants in Error.

Opinion filed Feb. 8, 1933

MR. JUSTICE HERRY DELIVERED THE OPINION OF THE COURT.

This is an action by Jay Tobey, Administrator of the Estate of Daniel Mahoney, Deceased, to recover damages resulting from negligence in the treatment, care and skillfully and negligently of the decedent by the defendants, Dr. Walter Manhoff and Dr. [illegible] G. Fox. The case was tried before the court and a jury, and at the close of the plaintiff's case the court, at the request of the defendants, instructed the jury to find the defendants not guilty, and entered a judgment upon the verdict, from which judgment the plaintiff prosecutes a writ of error.

It appears from the evidence that about May 2, 1927, Dr. Walter Manhoff, the family physician of the plaintiff's intestate, Daniel Mahoney, was called to attend the deceased in the lifetime. After a physical examination by the doctor, the patient was taken to the Oak Park Hospital for treatment. Dr. Manhoff called Dr. Charles F. Fox, who was also such a party defendant, and also a specialist, Dr. The operation upon the patient, Daniel Mahoney, and removed his appendix. The operation was performed in the presence of Dr. Manhoff. Dr. Fox was assisted in the operation by surgical intruses and nurses assigned to duty in the operating room by the hospital authorities. The Oak Park Hospital, where the operation was performed by the doctor, is considered a fine a hospital, with modern modern equipment. After the operation on the patient Daniel Mahoney, he remained at the Oak Park Hospital,

under the care and treatment of the defendants, and about two weeks after the operation the surgical stitches of the wound, which were inserted at the time of the operation, were removed, and thereupon pus began to drain from the wound. Thereafter on June 18, 1927, Dr. G. W. Hopkins was called, who in the presence of the defendants made an incision and inserted drains in the abdomen, and the patient remained in the hospital until July 9, 1927, when he was taken home. A male nurse, Wendall Bechtel, was called, who nursed, dressed and cared for the patient both at the hospital and at his home under the direction of the defendants. The tubes placed in the abdomen by Dr. Hopkins for the draining of the pus, were removed a short time after they were inserted. The defendants continued on the case, and on July 31, 1927, Dr. Rendtorff advised the patient's family that he was going out of town and that he would leave the patient in the care of Dr. Fox. This call was the last one made on the patient by Dr. Rendtorff. A subsequent call was made by Dr. Fox on August 9, 1927, at which time he cleaned the wound and put on dry packs, and told the patient's sister, who is a nurse and attended the patient at that time, to keep doing the same thing. The patient's sister testified that she tried to get in touch with Dr. Fox after that time, but was unable to do so; that she called Dr. D. G. Brust, who had the patient removed to the Westlake Hospital, located in Chicago. Dr. Brust operated, assisted by Dr. Edward A. Mladick, and removed from an abscess a gummy, stringy, greasy, black material, which appeared to be a piece of drainage gauze. It was embedded in the tissues of the abdomen and was found to be about a centimeter or two from the operative incision, and from its appearance and condition, would indicate that it had been in the body for some time. After the operation the patient's condition steadily grew worse, and he died on September 23, 1927, leaving the plaintiff,

under the care and treatment of the defendants, and about ten weeks after the operation the surgical stitches of the wound, which were inserted at the time of the operation, were removed, and thereupon pus began to drain from the wound. Thereafter on June 10, 1937, Dr. G. E. Hopkins was called, who in the presence of the defendants made an incision and inserted drains in the abdomen, and the patient remained in the hospital until July 8, 1937, when he was taken home, a male nurse, Wendell Bechtel, was called, who nursed, dressed and cared for the patient both at the hospital and at his home under the direction of the defendants. The bone plates in the abdomen by Dr. Hopkins for the draining of the pus, were removed a short time after they were inserted. The defendants continued on the case and on July 21, 1937, Dr. Hawthorne advised the patient's family that he was going out of town and that he would leave the patient in the care of Dr. Fox. This call was the last one made on the patient by Dr. Hawthorne. A subsequent call was made by Dr. Fox on August 9, 1937, at which time he cleaned the wound and put on dry packs, and told the patient's sister, who is a nurse and attended the patient at that time, to keep doing the same thing. The patient's sister testified that she tried to get in touch with Dr. Fox after that time, but was unable to do so; that she called Dr. G. E. Smart, who had the patient removed to the Louisiana Hospital located in Chicago. Dr. Smart operated, assisted by Dr. Edward A. Gladden, and removed from an abscess a gummy, stringy, greasy, black material, which appeared to be a piece of drainage gauze. It was embedded in the tissues of the abdomen and was found to be about a quarter or two from the operative incision, and from its appearance and condition, would indicate that it had been in the body for some time. After the operation the patient's condition improved, and he died on September 27, 1937, leaving the plaintiff

his widow, and a minor child as his only heirs at law and next of kin.

The point is made by the plaintiff that a motion to direct a verdict for the defendants should be denied and the cause submitted to the jury if there is any evidence in the record from which, if it stood alone, the jury could find, without acting unreasonably, in theeyes of the law, that the material averments of the declaration have been proved. In the consideration of this motion the evidence is to be viewed by the court in the light, including all reasonable and legitimate inferences that may be drawn therefrom, most favorable to the plaintiff. This rule, as contended for by the plaintiff, will be applied to the facts in the instant case. In the consideration of this question the court is also guided by the rule, which is supported by the weight of authority, that a physician is not a warrantor of cures, and if a good result is not obtained following treatment or an operation, such evidence should create no presumption of negligence or unskillfulness on the part of the doctor, and that mere conjecture or supposition will not be indulged in to overcome the presumption in favor of a doctor. Bollenbach v. Bloomenthal, 341 Ill. 539; Ewing v. Goode, 78 Fed. 442.

The negligence alleged in the declaration is, that the defendants permitted a piece of cotton gauze to remain in the body of the plaintiff's intestate at the site where the operative incision was made, which caused infection.

The evidence demonstrates that Dr. Fox performed the operation, assisted by Dr. Rendtorff, and that subsequently a sponge that had the appearance of a black stringy mass was removed from the tissues of the abdomen a centimeter or two from the operative incision.

It does not require the services of a medical expert

his widow, and a minor child as his only heirs at law and next of kin.

The point is made by the plaintiff that a motion to direct a verdict for the defendants should be denied and the cause submitted to the jury if there is any evidence in the record from which, if it stood alone, the jury could find, without acting unreasonably, in disregard of the law, that the material averments of the declaration have been proved. In the consideration of this motion the evidence is to be viewed by the court in the light, including all reasonable and legitimate inferences that may be drawn therefrom, most favorable to the plaintiff. This rule, as contended for by the plaintiff, will be applied to the facts in the instant case. In the consideration of this question the court is also guided by the rule, which is supported by the weight of authority, that a physician is not a warranter of cures, and if a good result is not obtained following treatment or an operation, such evidence should create no presumption of negligence or unskillfulness on the part of the doctor, and that mere conjecture or supposition will not be indulged in to overcome the presumption in favor of a doctor. Mullenhagen v. Glasenapp, 241 Ill. 529; Ziegler v. Hamm, 79 Ind. 464.

The negligence alleged in the declaration is, that the defendants permitted a piece of cotton gauze to remain in the body of the plaintiff's intestate at the site where the operative incision was made, using unusual instruments.

The evidence demonstrates that Dr. Fox performed the operation, assisted by Dr. Boutkoff, and that subsequently a sponge that had the appearance of a black string mass was removed from the abdomen of the widower, a realization on the from the operative incision.

It does not require the services of a medical expert

to determine the deleterious effect this embedded sponge in the abdomen, would have upon the condition of Howard Schaver. That the sponge was left in the abdomen at the time of the operation by the defendants is reasonably to be inferred from its appearance and condition when it was removed at a further operation, which was performed September 7, 1927, four months after the date of the operation of May 7, 1927.

The Appellate Court in the case of Hall v. Grosvenor, 267 Ill. App. 119, in a somewhat similar case, on the facts, said:

> "In no case do we find that the court had under consideration the isolated fact that a sponge or other foreign body was left in the wound after a surgical operation. It would seem to be self-evident that the failure to remove the sponge, standing alone and unexplained, is prima facie evidence of negligence. In McCormick v. Jones, 153 Wash. 508, it was held as a matter of law, 'that when a surgeon inadvertently introduces into a wound a foreign substance closes up the wound, leaving that foreign substance in the body, there being no possibility of any good purpose resulting therefrom, that act constitutes negligence,' and, 'we do not believe that the minds of reasonable men differ on this subject.' Other cases to this effect are Ruth v. Johnson, 172 Fed. 191; Wynne v. Harvey, 96 Wash. 379; Davis v. Kerr, 239 Pa. 351; Saucier v. Moss, 112 Miss. 306; Reeves v. Lutz, 179 Mo. App. 61."

and it was further said by the court in that opinion:

> "It is especially urged by the defendant that in the absence of expert medical testimony that the failure to remove the sponge was bad practice, plaintiff had failed to prove a case of negligence, relying on the oft quoted case of Ewing v. Goode, 78 Fed. 442. In that case the court was considering what it describes as 'the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all.' Other like cases are predicated upon the very proper and reasonable assumption that with reference to diseases in the human body only men versed in the science of surgery or medicine are qualified to pass judgment upon the treatment given in a particular case. This is so firmly established as a general rule as hardly to be debatable. But it does not need the aid of expert testimony for any intelligent person to have an opinion as to the impropriety of leaving a foreign object in a wound, especially of the size of the sponge in the record before us."

In the brief of the defendants it is suggested that there is not the slightest evidence from which it could properly be found that the gauze or foreign body in question was inserted

to determine the deleterious effect this embedded sponge in the abdomen, would have upon the condition of Howard Johnson. That the sponge was left in the abdomen at the time of the operation by the defendants is reasonably to be inferred from its appearance and condition when it was removed at a further operation, which was performed September 7, 1927, four months after the date of the operation of May 7, 1927.

The appellate Court in the case of Ball v. Greenwood, 267 Ill. App. 518, in a somewhat similar case, on the facts, said:

> "In an case in we find that the court had under consideration the isolated fact that a sponge or other foreign body was left in the wound after a surgical operation. It would seem to be self-evident that the failure to remove the sponge, standing alone and unexplained, is prima facie evidence of negligence. In Montgomery v. Jones, 127 Iowa, 500, it was held as a matter of law, 'that when a surgeon inadvertently introduces into a wound a foreign substance closes up the wound, leaving that foreign substance in the body, there being no possibility of any good purpose resulting therefrom, that our constitutional provisions, we do not believe that the minds of reasonable men differ on this subject.' Other cases to this effect are Duck v. Johnson, 172 Ind. 181; Lynch v. Barry, 90 Wash. 279; Jones v. Lair, 216 Ia. 431; Tennant v. Hope, 112 Wisc. 324; Graves v. Duke, 172 Ga. 472, 473."

and it was further said by the court in that opinion:

> "It is especially urged by the defendant that in the absence of expert medical testimony that the failure to remove the sponge was but negligence, plaintiff has failed to prove a case of negligence, relying on the rule created case of Ewing v. Goode, 78 Fed. 442. In that case the court was considering what it described as 'the operations and dread diseases of glaucoma, with respect to which a layman can have no knowledge at all.' Other like cases are predicated upon the very proper and reasonable assumption that with reference to diseases in the human body only men versed in the science of surgery or medicine are qualified to pass judgment upon the treatment given in a particular case. This is no firmly established as a general rule as hardly to be debatable. But it does not need the aid of expert testimony for any intelligent person to pass on matters in the ordinary of leaving a foreign object in a wound, especially of the size of the sponge in the wound before us."

In the brief of the defendants it is suggested that there is not the slightest evidence from which it could properly be found that the gauze or foreign body in question was inserted

or left in the deceased abdomen at the time of the operation, but even if it had been, there still could be no recovery because there is no evidence by laymen or expert to the effect that the defendants were in anywise negligent or unskillful in and about the operation. We are unable to agree with the suggestion. The evidence of the condition of the gauze, its appearance, and the length of time it was embedded in the abdomen standing alone and uncontradicted, tends to establish negligence of the defendants, as alleged in the declaration, and therefore the court erred in instructing the jury to find the defendants not guilty at the close of the plaintiff's case.

The defendants have called to our attention the case of Bollenbach v. Bloomenthal, 341 Ill. 539, among other authorities, as controlling upon the questions involved in the instant case. It is our belief, however, that the views herein expressed by this court are not inconsistent with the opinion of the Supreme Court. In that case the Supreme Court had the benefit of the evidence in the record offered by the plaintiff and the defendant, and held that the instruction given by the court was error. The court said, in part, in speaking of the instruction in question: that if the jury found -

> "'that in the ordinary course of events such an occurrence would not happen if those in control of such acts, instruments and objects use ordinary care, then the occurrence itself may afford reasonable evidence, in the absence of evidence to the contrary of equal weight, if there is such absence, that the occurrence arose from want of ordinary care.' This instruction should not have been given. The presumption raised by the doctrine of res ipsa loquitur does not require 'evidence to the contrary of equal weight' to overthrow it, for, as above stated, such presumption is not of itself evidence but arises as a rule of evidence and yields to any contrary proof. Presumptions are never indulged in against established facts. They are indulged in only to supply the place of facts, and as soon as any evidence is produced which is contrary to the presumption

or left in the deceased abdomen at the time of the operation, but even if it had been, there still would be no recovery because there is no evidence by layman or expert to the effect that the defendants were in anywise negligent or unskillful in and about the operation. We are unable to agree with the suggestion. The evidence of the condition of the pelvic, its appearance, and the length of time it was embedded in the abdomen standing alone and unconsidered, tends to establish negligence of the defendants, as alleged in the declaration, and therefore the court erred in instructing the jury to find the defendants not guilty at the close of the plaintiff's case.

The defendants have called to our attention the case of Bohannon v. Hammond, 41 Ill. 379, among other authorities, as controlling upon the questions involved in the instant case. It is our belief, however, that the views herein expressed by this court are not inconsistent with the opinion of the Supreme Court. In that case the Supreme Court had the benefit of the evidence in the record offered by the plaintiff and the defendant, and held that the instruction given by the court was error. The court said, in part, in speaking of the instruction in question: that if the jury found -

> "that in the ordinary course of events such an occurrence would not happen if there is control of such sponge, instrument and appliances are ordinary ones, then the occurrence itself is evidence of negligence, in the absence of evidence on the contrary of equal weight, if there is such evidence, that the occurrence arose from such of ordinary care.' This instruction should not have been given. The presumption raised by the doctrine of res ipsa loquitur does not require 'evidence to the contrary of equal weight' to overthrow it, for, as above stated, such presumption is not of itself evidence but arises as a rule of evidence and yields to any contrary proof. Presumptions are never included in ultimate established facts. They are included in only to supply the place of facts, and as soon as any evidence is produced which is contrary to the presumption

> which arose before the contrary proof was offered, the presumption vanishes entirely. * * * "

The opinion of the Supreme Court does not control upon the questions before us in the instant case. We have examined the evidence offered by the plaintiff and believe that we have rightfully expressed the view that the evidence tends to support the allegation of negligence in the plaintiff's declaration, which evidence stands alone and uncontradicted, and that this view is not contrary to the opinion of the court in the case of Bollenbach v. Bloomenthal, supra.

The plaintiff upon the trial and before the close of the plaintiff's case, asked leave to file additional counts 4 and 5, which was denied by the court. The 4th count alleges that the defendants unskillfully cared for and treated the plaintiff's intestate after the operation, and permitted him to be without sufficient medical care; and the 5th count alleges that the defendants, through negligence and want of care, permitted an infection to develop. The plaintiff contends that in refusing to permit the filing of these additional counts the court erred. In support of this theory, the plaintiff cites Sec. 39 of the Practice Act, Cahill's Rev. St. Chap. 110, as amended, as follows:

> "Any amendment to any pleading shall be held to relate back to the date of filing the original pleading so amended and the cause of action or defense set up in the amended pleading shall not be barred by laches, or lapse of time, under any statute prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleading that the cause of action asserted, or the defense interposed in the amended pleading grew out of the transaction or occurrence."

The additional 4th and 5th counts were offered by the plaintiff on February 10, 1931. The original count was filed on June 8, 1928, within one year after the death of Howard Schaver,

which arose before the contrary proof was offered, the presumption vanishes entirely. " " "

The opinion of the Supreme Court does not control upon the questions before us in the instant case. We have examined the evidence offered by the plaintiff and believe that we have rightfully expressed the view that the evidence tends to support the allegation of negligence in the plaintiff's declaration, which evidence stands alone and uncontradicted, and that this view is not contrary to the opinion of the court in the case of Hollenbeck v. Bissenthal, supra.

The plaintiff upon the trial and before the close of the plaintiff's case, asked leave to file additional counts 4 and 5, which was denied by the court. The 4th count alleges that the defendants unskillfully acted for and treated the plaintiff's intestate after the operation, and permitted him to be without sufficient medical care; and the 5th count alleges that the defendants, through negligence and want of care, permitted an infection to develop. The plaintiff contends that in refusing to permit the filing of these additional counts the court erred. In support of this theory, the plaintiff cites Sec. 55 of the Practice Act, Cahill's Rev. St. Chap. 110, as amended, as follows:

> "Any amendment to any pleading shall be held to relate back to the date of filing the original pleading as amended and the cause of action or defense set up in the amended pleading shall not be barred by laches, or lapse of time, under any statute prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleading that the cause of action asserted, or the defense interposed in the amended pleading grew out of the transaction or occurrence."

The additional 4th and 5th counts were offered by the plaintiff on February 15, 1921. The original court was filed on June 6, 1920, within one year after the death of Howard Bonaver,

which occurred on September 22, 1927, and on September 29, 1928, the plaintiff filed three additional counts after the time for filing had expired. At the time the 4th and 5th counts were presented to the court the time for filing these counts in an action under the statute for wrongful death, had expired. Sec. 2, Chap. 70 Cahill's Ill. Rev. Stats. 1931.

In our opinion, the passage of this amendment to Sec. 39 of the Practice Act, in force on July 1, 1929, was not for the purpose of permitting the filing of additional counts by the plaintiff stating a new cause of action after the time had expired and before the amendment to Sec. 39 was in force. It is selfevident that the additional counts 4 and 5 above mentioned, state a new and different cause of action from that alleged in the only count in the declaration, in which it is alleged, in substance, that the defendants negligently, carelessly and unskillfully permitted a piece of cotton gauze to remain in the body of the plaintiff's intestate at the site of the operative incision made upon the body of the plaintiff's intestate.

The rule is that the cause of action stated in the additional counts is regarded, as to such cause of action, as having been commenced at the time when such amended or additional count was filed. Devaney v. Otis, Elevator Co. 251 Ill. 28. This action is wholly statutory and the right to institute an action is conditional and the plaintiff must bring herself within the requirements of the act. The time within which to file this action goes to the existence of the right itself. In a death case the plaintiff must take advantage of his right to sue within the time required, which if not exercised, ceases to exist by its own limitation, Hartray v. Chicago Railways Co. 290 Ill. 85. The court did not err in denying leave to the plaintiff to file the 4th and 5th additional counts.

which occurred on September 22, 1927, and on September 28, 1928, the plaintiff filed three additional counts after the time for filing had expired. At the time the 4th and 5th counts were presented to the court the time for filing these counts in an action under the statute for wrongful death, had expired. See, 1, Chap. 70 Cahill's Ill. Ann. Stat., 1933.

In our opinion, the passage of this amendment to Sec. 39 of the Practice Act, in force on July 1, 1933, was not for the purpose of permitting the filing of additional counts by the plaintiff creating a new cause of action after the time had expired and before the amendment to Sec. 39 was in force. It is satisfactorily that the additional counts 4 and 5 above mentioned, state a new and different cause of action from that alleged in the only count in the declaration, in which it is alleged, in substance, that the defendants negligently, carelessly and unskillfully permitted a piece of cotton gauze to remain in the body of the plaintiff's intestate at the site of the operative incision made upon the body of the plaintiff's intestate.

The rule is that the cause of action stated in the additional counts is regarded, as to such cause of action, as having been commenced at the time when such amended or additional count was filed. Bowman v. Ohio, Elevator Co., 281 Ill. 32. This action is wholly statutory and the right to institute an action is conditional and the plaintiff must bring himself within the requirements of the act. The time within which to file this action goes to the existence of the right itself. In a death case the plaintiff must take advantage of his right to sue within the time required, which if not exercised, ceases to exist by its own limitation. Martens v. Chicago Railways Co., 340 Ill. 22. The court did not err in denying leave to the plaintiff to file the 4th and 5th additional counts.

From the conclusions we have reached in this case, we are of the opinion that the trial court erred in instructing the jury at the close of the plaintiff's evidence to find the defendant not guilty, and the judgment entered on the verdict is therefore reversed and the cause remanded for a further trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

WILSON, P.J. AND HALL, J. CONCUR.

35781

GEORGE W. SCHWARTZ,
Appellant,

v.

FRANCES J. PATTERSON,
Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Feb. 8, 1933

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals to this court from a judgment entered in the Municipal Court of Chicago for the defendant. This case was heard by the court, without a jury, upon an action to recover the amount due upon a promissory note signed by the defendant, upon which a judgment by confession was entered for the sum of $5513. Upon a petition of the defendant to vacate and set aside the judgment entered by confession, the court entered an order granting leave to the defendant to defend. The affidavit filed in support of the motion, was to be considered as an affidavit of merits, the judgment to stand as security. Thereafter an amended affidavit of merits of the defendant was filed by leave of court. The trial court, upon the conclusion of a hearing upon the merits found for the plaintiff in the sum of $1068.10, and entered judgment for that amount. The plaintiff prayed and was allowed an appeal on December 11, 1931. On December 12, plaintiff's appeal bond was approved and filed, and thereafter on December 19, 1931, the approval of this bond was vacated, and on December 23, 1931, the court vacated the judgment entered on December 11, 1931, and entered judgment upon a finding for the defendant. The plaintiff appealed from this judgment, and presented an appeal bond, which was approved and ordered filed.

The facts in the record are substantially that the promissory note was for services alleged to have been performed by

Opinion filed Feb. 8, 1932

Appeal from the Municipal Court of Chicago.

Judge presiding.

Mr. JUSTICE DUNN delivered the opinion of the court:

Plaintiff appeals to this court from a judgment entered in the Municipal Court of Chicago for the defendant. This suit was heard by the court, without a jury, upon an action to recover the amount due upon a promissory note signed by the defendant, upon which a judgment by confession was entered for the sum of $5615. Upon a petition of the defendant to vacate and set aside the judgment entered by confession, the court entered an order granting leave to the defendant to defend. The affidavit filed in support of the motion, was to be considered as an affidavit of merits, the judgment to stand as security. Thereafter an amended affidavit of merits of the defendant was filed by leave of court. The trial court, upon the conclusion of a hearing upon the merits found for the plaintiff in the sum of $5656.10, and entered judgment for that amount. The plaintiff moved and was allowed an appeal on December 13, 1931. On December 17, plaintiff's appeal bond was approved and filed, and thereafter on December 19, 1931, the approval of this bond was vacated, and on December 23, 1931, the court vacated the judgment entered on December 11, 1931, and entered judgment upon a finding for the defendant. The plaintiff appealed from this judgment, and presented an appeal bond, which was approved and perfected filed.

The facts in the record are substantially that the promissory note sue for matters alleged to have been performed by

the plaintiff as an accountant at the request of the defendant.

As a defense to this note it appears from the defendant's second amended affidavit of merits that representation was made by the plaintiff to the defendant that defendant's attorney had checked plaintiff's bill and agreed that it was correct; that the defendant stated that she would telephone her attorney, but was told by the plaintiff that plaintiff had telephoned the attorney's office and that the attorney had gone for the day.

As a further defense, notwithstanding a fiduciary relationship, the plaintiff induced the defendant to sign a judgment note, which was obtained by fraud and deceit; and the defendant in support of the affidavit of merits, testified to the effect that the plaintiff induced the defendant to come to his office and arrange for the payment of his bill; that the plaintiff talked to the defendant for about two hours, and that she became excited when informed that plaintiff's bill was over $5,000; that she informed the plaintiff that she would have to take the bill up with Mr. Nordorf, her attorney, when she was informed by the plaintiff that plaintiff had already taken the matter up with Mr. Nordorf; that she then wanted to call up Mr. Nordorf, but plaintiff said that he had called Nordorf's office, and the girl in the office said that Mr. Nordorf had gone for the day, and that Nordorf had told the plaintiff to tell the defendant to sign anything he had for her. The plaintiff dictated a letter to the effect that defendant would pay the balance of the indebtedness in 1934, at which time a mortgage would mature. The defendant promised that she would increase the mortgage on the store and pay the plaintiff, and the plaintiff stated that there would be no interest if she would sign something to indicate that he would get his money.

There is evidence in the record by L. A. Nordorf, who was the attorney for the defendant, that he does not remember that

the plaintiff as an accountant at the request of the defendant.

As a defense to this note it appears from the defendant's second amended affidavit of merits that representation was made by the plaintiff to the defendant that defendant's attorney had drawn plaintiff's bill and agreed that it was correct; that the defendant stated that she would take no further by attorney, but sent word by the plaintiff that plaintiff had telephoned the attorney's office and that the attorney had gone for the day.

In a further defense, notwithstanding a [illegible] obligation, the plaintiff induced the defendant to sign a judgment note, which was obtained by fraud and deceit; and the defendant in support of the affidavit of merits, testified to the effect that the plaintiff induced the defendant to come to his office and arrange for the payment of his bill; that the plaintiff talked to the defendant for about two hours, and that she became excited when informed that plaintiff's bill was over $2,000; that she informed the plaintiff that she would have to take the bill up with Mr. Norbert, her attorney, when she was informed by the plaintiff that plaintiff had already taken the matter up with Mr. Norbert; that she then agreed to call up Mr. Norbert, but plaintiff said that he had called Norbert's office, and the girl in the office said that Mr. Norbert had gone for the day, and that Norbert had told the plaintiff to tell the defendant to sign anything he had for her. The plaintiff discussed a letter to the effect that defendant would pay the balance of the indebtedness in 1934, at which time a mortgage would mature. The defendant promised that she would increase the mortgage on the store and pay the plaintiff, and the plaintiff stated that there would be no interest if she would sign something to indicate that he could get his money.

There is evidence in the record by L. A. Norbert, who was the attorney for the defendant, that he does not remember that

he talked to Mr. Schwartz, the plaintiff, about his fees as an accountant, and that he never had a telephone conversation with the plaintiff as to Mrs. Patterson signing a note. The plaintiff, however, denied that he stated to the defendant that Nordorf's office was telephoned to at the time of the signing of the note, and that the girl answering the telephone for Mr. Nordorf stated that Mr. Nordorf had gone for the day.

There is a conflict in the evidence as to what was said and done by the parties present at the time the defendant signed the promissory note made payable on or about May 23, 1934, and also upon the value of the services rendered by the plaintiff as an accountant. It appears from the record, however, that at the instance of the plaintiff a judgment by confession for the amount of the note was entered on the day following the execution of this note by the defendant.

The defendant contends that the sole question before the trial court was one of fact. One of the questions of fact in the case is did Nordorf make the statement to the plaintiff reported by him, the plaintiff, to the defendant. That statement was the inducing cause relied upon by the defendant when she executed and delivered the promissory note.

In reaching its conclusion the court passed upon the credibility of the witnesses and the weight of the evidence, and concluded that the defendant was improperly induced to sign the promissory note. There is sufficient evidence in the record to sustain the judgment entered by the court, and such judgment is not against the manifest weight of the evidence.

The plaintiff contends that the court was without jurisdiction to correct the judgment of December 11, 1934. The orders entered in the Municipal Court were within thirty days after the

be liable to us, therefore, the plaintiff, which she does in an accountant, and that he never had a telephone conversation with the plaintiff as to are. Letterson signing a note. The plaintiff, however, denied that he stated to the defendant that Borkert's office was telephoned to at the time of the signing of the note, and that the girl answering the telephone for Mr. Borkert stated that Mr. Borkert had gone for the day.

There is a conflict in the evidence as to what was said and done by the parties present at the time the defendant signed the promissory note made payable on or about May 23, 1924, and also upon the value of the services rendered by the plaintiff as an accountant. It appears from the record, however, that at the instance of the plaintiff a judgment by confession for the amount of the note was entered on the day following the execution of this note by the defendant.

The defendant contends that the sole question before the trial court was one of fact. One of the questions of fact in the case is did Borkert make the statement to the plaintiff reported by him, the plaintiff, to the defendant. That statement was the inducing cause relied upon by the defendant when she executed and delivered the promissory note.

In reaching its conclusion the court passed upon the credibility of the witnesses and the weight of the evidence, and concluded that the defendant was improperly induced to sign the promissory note. There is sufficient evidence in the record to support the judgment entered by the court, and such judgment is not against the manifest weight of the evidence.

The plaintiff contends that the court was without jurisdiction to correct the judgment of December 11, 1924. The papers entered in the Municipal Court were within thirty days after the

date of the judgment, and the general rule is that the trial court retains jurisdiction during term time, and in the Municipal Court for thirty days after the entry of the judgment, and the court, having control over the judgments within the period indicated, may not only set aside a judgment, but may also set aside an order approving an appeal bond. In the instant case, the court vacated the approval of the plaintiff's appeal bond, vacated the judgment for the plaintiff in the sum of $1,066.10 as due the plaintiff, and entered judgment for the defendant, from which judgment the plaintiff appealed to this court. The trial court had jurisdiction and the authority to make entry of the several orders, and was fully justified in doing so. Finkelstein v. Lyons, 350 Ill. 27.

The defendant suggests that while it may appear that the plaintiff is entitled to a judgment for services rendered under his agreement, less the amount paid on account, the plaintiff waived that right in refusing to accept the finding of the court in his favor for the amount of $1066.10; that by his conduct he took an unfair advantage of the defendant, and the plaintiff's conduct should preclude his right of recovery. We know of no rule of law that because the plaintiff exercised his right to appeal under the circumstances suggested he forfeited his right to question the action of the trial court.

The defendant does not claim that the debt due the plaintiff is paid, but admits in effect that the plaintiff may be entitled to a judgment for services rendered. The promissory note signed by the defendant was not paid, and as a general rule the taking of a note does not extinguish the debt unless an intention to extinguish the debt is made to appear, which may be manifested by an express agreement or inferred from the circumstances. The taking of the note by the plaintiff for a pre-existing debt is a conditional

date of the judgment, and the general rule is that the trial court retains jurisdiction during term time, and in the municipal court for thirty days after the entry of the judgment, and the court, having control over the judgments within the period indicated, may not only set aside a judgment, but may also set aside an order approving an appeal bond. In the instant case, the court vacated the approval of the plaintiff's appeal bond, vacated the judgment for the plaintiff in the sum of $1,088.10 in due the plaintiff, and entered judgment for the defendant, from which judgment the plaintiff appealed to this court. The trial court had jurisdiction and the authority to make entry of the several orders, and was fully justified in doing so. Jacksonville v. Lynch, 188 Ill. 87.

The defendant suggests that while it may appear that the plaintiff is entitled to a judgment for services rendered under his agreement, less the amount paid on account, the plaintiff waived that right in refusing to accept the finding of the court in his favor for the amount of $1088.10; that by his conduct he took an unfair advantage of the defendant, and the plaintiff's conduct should preclude his right of recovery. In lieu of no rule of law that because the plaintiff exercised his right to appeal under the circumstances suggested he forfeited his right to question the action of the trial court.

The defendant does not claim that the debt due the plaintiff is paid, but admits in effect that the plaintiff may be entitled to a judgment for services rendered. The promissory note signed by the defendant was not paid, and as a general rule the taking of a note does not extinguish the debt unless an intention to extinguish the debt is made to appear, which may be manifested by express agreement or inferred from the circumstances. The taking of the note by the plaintiff for a preexisting debt is a conditional

payment only. McHenry v. Croft, 163 Ill. App. 438.

The question of the plaintiff being precluded from maintaining a further right of action is not before this court at this time, and the court is without jurisdiction to pass upon that question.

The evidence sustains the finding of the court, and we are satisfied that there is no error that would justify a new trial. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HALL, J. CONCUR.

answer only. Mathews v. Smith, 163 Ill. 171, 45 N.E.

The question of the priority being precluded from maintaining a further right of action as was before this court at this time, and the court is without jurisdiction to pass upon this question.

The evidence sustains the finding of the court, and we are satisfied that there is no error that would justify a reversal. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

ETHAN, P.J., and ALLEN, J., concur.

35808

SAM BRODSKY,

Defendant in Error,

v.

ALBERT WECHSLER AND ANNA WECHSLER,

Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

269 I.A. 651

Opinion filed Feb. 8, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The defendants are before this court upon a writ of error to question the sufficiency of the record to sustain a judgment entered by confession on April 30, 1931, in the Municipal Court of Chicago, in favor of the plaintiff and against the defendants on two notes executed by them, one dated August 4, 1930, for $302.50, and the other note for $500, dated December 12, 1929, payable to the order of A. Brodsky and by him endorsed to the plaintiff. The judgment included $114.55 attorney's fees and interest. The total amount of the judgment was $933.85. The defendants were granted leave to defend, and upon a trial before the court, without a jury, the judgment entered by confession was confirmed on July 13, 1931. On August 12, 1931, the defendants moved to vacate the judgment as confirmed on July 13, 1931, supported by affidavits. on the ground of newly discovered evidence, which motion was denied.

Defendants urge as a ground for reversal, that the judgment is against the manifest weight of the evidence, and therefore erroneous.

From an examination of the evidence in the record, there is a conflict upon the question as to whether the defendant Anna Wechsler's signature on the note dated December 12, 1929, payable to A. Brodsky, is genuine. The other note signed by the defendant for the sum of $302.50 is admitted.

Opinion filed Feb. 8, 1933

MR. JUSTICE HEALY DELIVERED THE OPINION OF THE COURT.

The defendants are before this court upon a writ of error to question the sufficiency of the record to sustain a judgment entered by confession on April 27, 1931, in the municipal court of Chicago, in favor of the plaintiff and against the defendants on two notes executed by them, one dated August 6, 1930, for $302.80, and the other note for $800, dated December 12, 1930, payable to the order of A. Bradsby and by him endorsed to the plaintiff. The judgment included $114.55 attorney's fees and interest. The total amount of the judgment was $1257.35. The defendants were granted leave to defend, and upon a trial before the court, without a jury, the judgment entered by confession was confirmed on July 17, 1931. On August 12, 1931, the defendants moved to vacate the judgment as confirmed on July 17, 1931, supported by affidavits. On the ground of newly discovered evidence, which motion was denied.

Defendants urge as a ground for reversal, that the judgment is against the manifest weight of the evidence, and therefore erroneous.

From an examination of the evidence in the record, there is a conflict upon the question as to whether the defendant Ann Vandiver's signature on the note dated December 12, 1930, payable to A. Bradsby, is genuine. The other note signed by the defendant for the sum of $800.00 is admitted.

There is evidence offered by the plaintiff that Albert Wechsler borrowed moneys from A. Brodsky on two different dates, and, to secure payment, executed two promissory notes for the sum of $500 each, and upon maturity of these notes, defendant Albert Wechsler, from moneys received from a loan association, paid to A. Brodsky $365 on account, leaving a balance due on one note of $302.50, and on the other $500; that at the time Albert Wechsler paid A. Brodsky $365, Albert Wechsler prepared and signed the two notes in question. Thereafter, at Albert Wechsler's home, Anna Wechsler, mother of Albert Wechsler, signed both notes. A. Bordsky delivered the two matured notes for $500 each, and received two notes signed by the defendants for the amounts heretofore mentioned.

The court had the benefit of seeing the witnesses and hearing their testimony and determined the weight of the evidence when it confirmed the judgment for the amount entered by confession. The questions passed upon by the court were determined in favor of the plaintiff, and we are unable to find that the court was not justified in so doing. The judgment is not against the manifest weight of the evidence.

The defendants also complain that the trial court erred in the comparison of the signatures on the notes. One note is admittedly signed by Anna Wechsler and Albert Wechsler, the other defendant, but Anna Wechsler denies having signed the $500 promissory note.

In this state there is a provision in the statute which provides that handwriting may be proved by comparison with the writing admitted to be genuine or proved to be genuine to the satisfaction of the court. Chap. 51, Par. 50, Cahill's Ill. Rev. Stats. 1931. The notes in the instant case were admitted in evidence, and the court in determining the question whether the disputed signature

There is evidence offered by the plaintiff that Albert Wachsler borrowed money from A. Brodsky on two different dates, and to secure payment, executed two promissory notes for the sum of $500 each, and upon maturity of these notes, defendant Albert Wachsler from moneys received from a loan association, paid to A. Brodsky $500 on account, leaving a balance due on one note of $500.00, and on the other $500; that at the time Albert Wachsler paid A. Brodsky $500, Albert Wachsler procured and signed the two notes in question. Therefore, at Albert Wachsler's home, Max Wachsler, father of Albert Wachsler, signed both notes. A. Brodsky delivered the two mature notes for $500 each, and received the notes signed by the defendants, for the amounts particular mentioned.

The court had the benefit of seeing the witnesses and hearing their testimony and determined the weight of the evidence when it confirmed the judgment for the amount ordered by compromise. The questions raised upon by the court were determined in favor of the plaintiff, and we are unable to find that the court was not justified in so doing. The judgment is not against the manifest weight of the evidence.

The defendants also complain that the trial court erred in the comparison of the signatures on the notes. One note is admittedly signed by Max Wachsler and Albert Wachsler, the other defendant, but Max Wachsler denies having signed the $500 promissory note.

In this state there is a provision in the statute which provides that handwriting may be proved by comparison with the writing admitted to be genuine or proved to be genuine to the action of the court. Chap. 51, Par. 10, Smith's Ill. Ann. Stat. 1921. The notes in the instant case were admitted in evidence, and the court in determining the genuineness whether the disputed signature

on one of the notes was genuine, was permitted by the provision of the statute to compare this note with the note admitted to bear the genuine signature of Anna Wechsler. The evidence tends to show that Anna Wechsler's signature was placed on the notes at one and the same time. This court is satisfied from the evidence that the trial court did not err in concluding from the evidence that the notes were signed by Anna Wechsler.

While it is true that in an action of the fourth class in the Municipal Court of Chicago, the case is made by the evidence, in answer to defendant's contention that there is want of consideration, there is evidence bearing upon that question. The matured notes of Albert Wechsler were surrendered when A. Brodsky extended the time of payment and accepted the notes signed by the defendants.

The defendants complain that the judge arbitrarily refused to allow the motion to vacate the judgment for the defendants. The record in this case does not bear out this contention, for on August 13, 1931, it appears that the motion to vacate the judgment entered on July 13, 1931, was overruled, and that additional time was granted by the court to file an appeal bond.

It also appears that certain affidavits, which appear in the bill of exceptions, were offered and made a part of the proceedings before the court.

The affidavits in support of the motion do not show diligence on the part of the defendants to secure the attendance of the witness Harry Sobel in order to offer the evidence of Sobel that he was present at the time the note was signed by Anna Wechsler. It appears from the record that Albert Wechsler testified at the trial that when his mother signed a note the witness Sobel was present. From this knowledge of the defendants, and the fact

on one of the notes was genuine, was permitted by the provision of the statute to compare this note with the note admitted to be the genuine signature of Anna Wechsler. The evidence tends to show that Anna Wechsler's signature was placed on the notes at one and the same time. This court is satisfied from the evidence that the trial court did not err in concluding from the evidence that the notes were signed by Anna Wechsler.

While it is true that in an action of the fourth class in the municipal court of Chicago, the case is made by the evidence, in answer to defendant's counsellor that there is need of consideration, there is evidence bearing upon that question. The unpaid notes of Albert Wechsler were surrendered when i. matsky extended the time of payment and accepted the notes signed by the defendants.

The defendants complain that the judge arbitrarily refused to allow the motion to vacate the judgment for the defendants. The record in this case does not bear out this contention. For on August 13, 1921, it appears that the motion to vacate the judgment entered on July 13, 1921, was overruled, and that additional time was granted by the court to file an appeal bond.

It also appears that section "11Ill.Prac", which appears in the bill of exceptions, were altered and made a part of the proceedings before the court.

The affidavits in support of the motion do not show diligence on the part of the defendants to secure the attendance of the witness Harry Bedel in order to offer the evidence of Bedel that he was present at the time the note was signed by Anna Wechsler. It appears from the record that Albert Wechsler testified at the trial that when his mother signed a note the witness Bedel was present. From this knowledge of the defendants, and the fact

that the evidence is but cumulative, it was not erroneous for the trial court to deny the motion to vacate the judgment that was confirmed on July 13, 1931.

It appears that the trial court allowed $6.80 interest which accrued after the matured date of thenotes. This amount is less than the accrued amount at the rate of 5% per annum allowed by the statutory provision set forth in Chap.74, Para. 2, Cahill's Ill. Rev. Stats. 1931.

There being no error in the record the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HALL, J. CONCUR.

that the evidence is but cumulative, it was not erroneous for the trial court to deny the motion to vacate the judgment but not overruled on July 12, 1921.

It appears that the trial court allowed 6.80 interest which instead after the entered date of judgment. This amount is less than the accrued amount at the rate of 6% per annum allowed by the statutory provision set forth in Chap.74, Pars. 2, Smith's Ill. Ann. Stats. 1921.

There being no error in the record the judgment is affirmed.

ATTORNEY DIVISION.

WILSON, P.J. AND ZIEGLER, J. CONCUR.

35820

NORMAN MOREN,	)	ERROR TO
Defendant in Error,	)	
v.	)	MUNICIPAL COURT,
JACOB SIEGEL, DORA SIEGEL, ANGEL LEBOVITZ and IDA LEBOVITZ,	)	OF CHICAGO.
Plaintiffs in Error.	)	

Opinion filed Feb. 8, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This case comes before this court upon a writ of error sued out by the defendants from a judgment entered in the Municipal Court of Chicago. The action instituted in that court by the plaintiff against the defendants was upon a judgment note upon which judgment was confessed on May 23, 1930, for $2,853. Upon motion the defendants were granted leave to defend, and to file their affidavit of merits. Upon a hearing before the court, without a jury, the judgment was affirmed.

The defendants contend that the trial court erred in denying the defendants' motion to find the issues for the defendants, both at the close of the plaintiff's case and at the close of all the evidence, and that the court erred in affirming the judgment entered by confession against the defendants.

In the consideration of the defendants' contention, this court finds the facts in the instant case to be, substantially, that upon the trial, the parties stipulated in open court that the note in question was one of a series of three notes, signed by the defendants to secure an indebtedness of $20,000, and for the purpose of securing such payment, the defendants conveyed the property located at 3641-47 Montrose Avenue, Chicago, Illinois, by a trust deed to the Foreman Trust & Savings Bank. This property was thereafter sold by the defendants to Louis Kanne, subject to the indebtedness of $20,000, and on or about January 23, 1929, and before the

NORMAN MORRIS,	ERROR TO
Defendant in Error,	
v.	
JACOB GLUCK, DONA GLUCK, ABRAM LEKOVITZ and IDA LEKOVITZ,	SUPERIOR COURT
Plaintiffs in Error.	OF CHICAGO.

Opinion filed Feb. 8, 1933

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This case comes before this court upon a writ of error sued out by the defendants from a judgment entered in the municipal court of Chicago. The action instituted in that court by the plaintiff against the defendants was upon a judgment note upon which judgment was confessed on May 25, 1930, for $2,883. Upon motion the defendants were granted leave to defend, and to file their affidavit of merits. Upon a hearing before the court, without a jury, the judgment was affirmed.

The defendants contend that the trial court erred in denying the defendants' motion to find the issues for the defendants, both at the close of the plaintiff's case and at the close of all the evidence, and that the court erred in affirming the judgment entered by confession against the defendants.

In the consideration of the defendants' contention, this court finds the facts in the instant case to be, substantially, that upon the trial, the parties stipulated in open court that the note in question was one of a series of three notes, signed by the defendants to secure an indebtedness of $80,000, and for the purpose of securing such payment, the defendants conveyed the property located at 3841-47 Montrose Avenue, Chicago, Illinois, by a trust deed to the Foreman Trust & Savings Bank. This property was thereafter sold by the defendants to Louis Kamm, subject to the indebtedness of $80,000, and on or about January 23, 1929, and before the

maturity of the note, which was February 24, 1929, Kanne sold the property above mentioned to Emil Balsam, subject to the same indebtedness and secured by the trust deed hereinbefore mentioned. Upon an examination of the title to the real estate mentioned, it appears that two prepayments evidenced by notes of $2500 each, were provided for in the trust deed, and that these notes became due on February 24, 1929 and 1930.

There is evidence that, in order to comply with the terms of the contract between Kanne and Balsam, the conveyance of the real estate was to be subject to the maturity of the $30,000 indebtedness on February 24, 1932; that Kanne and Balsam, on January 23, 1929, entered into an escrow agreement with the Foreman Trust and Savings Bank, the then holder of the notes. This escrow agreement provided substantially, that the sale of the real estate at 3641-47 Montrose Avenue, Chicago, to Emil Balsam by Kanne, was taken subject to the $30,000 incumbrance, which was to become due February 24, 1932; that Kanne agreed that the payments due in February 1929 and 1930 were to be extended to February 24, 1932, and Kanne deposited $2500 with the Bank to take up the note due February 24, 1929, with directions that the Bank hold said note uncancelled, and extend the same to become due February 24, 1932, and that Kanne further agreed to pay the Bank $2500 for the second note, due February 24, 1930. Then follow like directions that the Bank hold the note uncancelled and endorse an extension thereon making the note mature on February 24, 1932; also the provision in case of default by Kanne, which is of no material importance in the discussion of this case. The note in question was released by the bank from the terms of the escrow agreement with the consent of the parties to the escrow agreement, and delivered to Kanne.

The liability of the defendants on the notes was not discharged by payment and the question whether the plaintiff

maturity of the note, which was February 24, 1930, Kamm sold the property above mentioned to Emil Nelson, subject to the same liens, encumbrances and secured by the trust deed hereinbefore mentioned. Upon an examination of the title to the real estate mentioned, it appears that two prepayments evidenced by notes of $1000 each, were provided for in the trust deed, and that these notes became due on February 24, 1929 and 1930.

There is evidence that, in order to comply with the terms of the contract between Kamm and Nelson, the conveyance of the real estate was to be subject to the maturity of the $30,000 indebtedness on February 24, 1927; that Kamm and Nelson, on January 21, 1926, entered into an earlier agreement with the Commercial and Savings Bank, the then holder of the notes. This earlier agreement provided substantially, that the sale of the real estate at 1441-47 Montrose Avenue, Chicago, to Emil Nelson by Kamm, was taken subject to the $20,000 incumbrance, which was to become due February 24, 1928; that Kamm agreed that the payments due in February 1928 and 1929 were to be extended to February 24, 1929, and Kamm executed [illegible] with the Bank to take up the note due February 24, 1929, with directions that the Bank hold such note uncancelled, and retain the same to become due February 24, 1927, and that Kamm further agreed to pay the Bank $1000 for the second note, due February 24, 1928. Then follow like directions that the Bank hold the note uncancelled and enjoyed an extension thereon making the note mature on February 24, 1929; also the provision in case of default by Kamm, which is of no material importance in the discussion of this case. The note in question was released by the Bank from the terms of the earlier agreement with the mutual of the parties to the earlier agreement, and delivered to Kamm.

The liability of the defendants on the notes was not discharged or released nor the question affect the validity

received the note in due course is not altogether important. The real question is, as we understand the defendants' position, did Kanne assume the payment of the note when the real estate was conveyed to him, and thereby relieve the defendants from liability? The evidence in this case does not show an express assumption of the indebtedness in question by Kanne, or that the amount was allowed to Kanne on the purchase price so that the law will imply a promise by Kanne to pay this incumbrance.

In Peoples Savings & Loan Assn. v. Brinkoetter, 263 Ill. App. 391, the appellate court in passing upon the question of when a mortgage indebtedness is assumed by a grantee of land, said:

> "It is true that a contract may be implied, and that if the amount of an encumbrance is included in and forms a part of the consideration which a grantee promises to pay for premises, and he retains that part of the purchase price, the law will create a personal liability against him, on the ground that he has agreed to pay such indebtedness. In such a case the law presumes that the grantee has agreed to apply the money so retained for the purpose of paying the encumbrance. Either there must be an express assumption of the indebtedness, or the amount must be allowed in the purchase price so that the law will imply the promise.
>
> "It is not contended, and the evidence does not show, that the mortgage indebtedness was included in or formed any part of the consideration for the purchase price of the mortgaged premises, which would form a legal basis for an implied assumption of the mortgage indebtedness."

It is well to have in mind that by the terms of the escrow agreement entered into, the defendants' status was not changed so as to relieve them from liability upon the note in question. From the escrow agreement it clearly appears that it was the intention of Kanne to keep intact the liability of the defendants. Fleming v. Gannon, 287 Ill. App. 163.

The note in the instant case provides by express agreement of the defendants as makers, to an extension of the due date of the note. The provision for an extension is in these words:

received the note in due course is not altogether important. The real question is, as we understand the defendants' position, did Lamm assume the payment of the note when the real estate was conveyed to him, and thereby relieve the defendants from liability? The evidence in this case does not show an express assumption of the indebtedness in question by Lamm, or that the amount was allowed to Lamm on the purchase price so that the law will imply a promise by Lamm to pay this incumbrance.

In Inquire Printing & Lock Co. v. Stimpleton, 202 Ill. App. 391, the appellate court in passing upon the question of when a mortgage indebtedness is assumed by a grantee of land, said:

> "It is true that a contract may be implied, and that if the amount of an encumbrance is included in and forms a part of the consideration which a grantee promises to pay for premises, and be retains that part of the purchase price, the law will create a personal liability against him, as the grantee thus be has agreed to pay such indebtedness. In such a case the law presumes that the grantee has agreed to apply the money so retained for the purpose of paying the encumbrance. Either there must be an express assumption of the indebtedness, or the amount must be allowed in the purchase price so that the law will imply the promise.
>
> "It is not contended, and the evidence does not show, that the mortgage indebtedness was included in or formed any part of the consideration for the purchase price of the mortgaged premises, which would have a legal basis for an implied assumption of the mortgage indebtedness."

It is well to bear in mind that by the terms of the notes expressed dated late, the defendants' wife was not charged so as to relieve them from liability upon the note in question from the escrow agreement it clearly appears that it was the intention of Lamm to keep intact the liability of the defendants. Fleming v. Damen, 207 Ill. App. 182.

The note in the instant case provides by express agreement of the defendants as makers, to an extension of the due date of the note. The provision for an extension is in these words:

> "If the holder hereof shall elect to extend the time of payment of said principal sum, or any part thereof, such extension shall not diminish the liability of the undersigned for the payment thereof, nor impair this power, and the undersigned waives notice of such extension."

The defendants were not prejudiced by the extension of the due date of this note. The extension was consented to by the defendants when they signed the promissory note, and by its express terms, agreed that the extension of time for payment would not diminish the liability of the defendants.

The plaintiff received the promissory note from Kanne for work and labor performed for Kanne. The note has matured, is due and has not been paid by these defendants. From the conclusions we have reached, there does not seem to be any defense by the defendants which would justify a reversal if Kanne instead of the plaintiff prosecuted this action and a judgment was entered.

There being no reversible error in the record, the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HALL, J. CONCUR.

> "If the holder hereof shall elect to extend the time of payment of said principal sum, or any part thereof, such extension shall not diminish the liability of the undersigned for the payment thereof, nor impair this secty, and the undersigned waives notice of such extension."

The defendants were not prejudiced by the extension of the due date of this note. The extension was consented to by the defendants when they signed the promissory note, and by its express terms, agreed that the extension of time for payment would not diminish the liability of the defendants.

The plaintiff received the promissory note from Kenne for work and labor performed for Kenne. The note has matured, is due and has not been paid by these defendants. From the conclusions we have reached, there does not seem to be any defense by the defendants which would justify a reversal of the plaintiff's recovery this action and a judgment was entered.

There being no reversible error in the record, the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

KIBBON, P.J. AND HALL, J. CONCUR.

35787

JACOB COTTIN and RUDOLPH J. JOSEPH, Doing Business as COTTIN & JOSEPH,

Plaintiffs, Appellees,

v.

MORRIS I. PICKUS and COMPASS SALES CORPORATION, a Corporation,

Defendants, Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

269 I.A. 650

Opinion filed Feb. 8, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment of the Municipal Court of Chicago in a suit brought against them for attorneys fees. The cause was submitted to the court and a finding made in favor of plaintiffs, assessing their damages at $560, upon which finding judgment was entered. No briefs were filed, nor appearance entered by appellees in this court.

Plaintiffs are attorneys-at-law, located in the city of New York. Plaintiff, Cottin, testified that in January, 1930, the defendant, Pickus, President of the defendant Compass Sales Corporation, accompanied by one Balkin, called upon Cottin in his office in New York; that the three discussed the possibility of putting a competitor of the Compass sales Corporation, the Master Service, Inc., out of business, so that Balkin, who was employed by the Master Service, Inc., might be released from a contract which he had with that institution. Cottin further testified that Pickus informed him that the Compass Sales Corporation would not be interested in Balkin until Balkin was free from Master Service, Inc.; that thereafter Balkin came to Chicago and had a conference with one Frank B. Mayer, Secretary and Treasurer of defendant, Compass Sales Corporation, and that Mayer told him, Balkin, that the Compass Sales Corporation would pay one half of Balkin's legal expenses for getting Balkin out of his contract with Master Service, Inc., but that no arrangement

Opinion filed Feb. 8, 1933

Mr. JUSTICE BAIL DELIVERED THE OPINION OF THE COURT:

This is an appeal by defendants from a judgment of the municipal court of Chicago in a suit brought against them for attorney fees. The cause was submitted to the court and a finding made in favor of plaintiffs, assessing their damages at $250. Upon which finding judgment was entered. No briefs were filed, but appellees entered by appellants in this court.

Plaintiffs are attorneys-at-law, located in the city of New York. Plaintiff, Cohen, testified that in January, 1930, the defendant, Jackson, resident of the defendant Chicago Union Station, accompanied by one Wilkie, called upon Cohen in his office in New York; that the latter discussed the possibility of getting a modification of the Chicago Union Station, the matter involved, and of business, as did Wilkie, who was employed by the Union Station, Inc., might be released from a contract which he had with that institution. Cohen further testified that Jackson informed him that the Chicago Union Corporation would not be interested in Wilkie until Wilkie was free from Union Station Inc.; that if there after Wilkie came to Chicago and had a conference with the Union, expir, terminate and transmit of defendant, Chicago Union Corporation and that upon this, Wilkie, that the Chicago Union Corporation would pay the bill of Wilkie's legal expenses for getting Wilkie and of his contract with Union Station, Inc., but that he attempted

could be made concerning the matter until Pickus, who was ill and was in the hospital, had recovered; that thereafter Balkin returned to New York and ordered the plaintiff, Cottin, to proceed with the foreclosure of a chattel mortgage which Balkin had on the property of Master Service, Inc. Cottin proceeded with the foreclosure as directed by Balkin, and as a result of a deal made Balkin became the owner of all the capital stock of Master Service, Inc.

It further appears that during the pendency of the procedure, defendants were not consulted nor advised until the deal was consummated, by which Balkin gained control of the stock and property of Master Service, Inc., and knew nothing about what was going on or had taken place. On the date of the consummation of this deal, plaintiff, Cottin, wrote Pickus informing him as to what had been done in the premises, and that Balkin had been elected president and treasurer, his (Balkin's) wife, vice president, and he, Cottin, Secretary of Master Service, Inc., and that although it cost considerable money, still considering the value of what had been acquired, he was of the opinion that he had "got away very cheaply." In reply to this letter from plaintiff, Cottin, the Compass Sales Corporation informed Cottin that defendant, Pickus, had not been shown the letter because of his illness. Thereafter, Cottin wrote another letter to Compass Sales Corporation enclosing his bill for services, and informing defendant that he and Balkin were in control of Master Service, Inc., and that if no conclusion was reached with Compass Sales Corporation regarding Balkin's employment by it, that he and Balkin were going ahead on their own account. Cottin further testified that the purpose of foreclosing Balkin's chattel mortgage on the property of the Master Service, Inc., was not to put this institution out of business, but to gain control of it for Balkin.

could be made concerning the matter until Jenkins, who was ill and was in the hospital, had recovered; that thereafter Smith returned to New York and ordered the plaintiff, Dottin, to proceed with the foreclosure of a chattel mortgage which Smith had on the property of Master Service, Inc. Dottin proceeded with the foreclosure as directed by Smith, and as a result of a deal made Smith became the owner of all the capital stock of Master Service, Inc.

It further appears that during the pendency of the foreclosure, defendants were not consulted nor advised until the deal was consummated, by which Smith gained control of the stock and property of Master Service, Inc., and knew nothing about what was going on or had taken place. On the date of the consummation of this deal, plaintiff, Dottin, wrote Pickens informing him as to what had been done in the premises, and that Smith had been elected president and treasurer, his (Smith's) wife, vice president, and he, Dottin, Secretary of Master Service, Inc., and that although it was regrettable sorry, still considering the value of what had been acquired, he was of the opinion that he had "got away very cheaply." In reply to this letter from plaintiff, Dottin, the Compass Sales Corporation informed Dottin that defendant, Jenks, had not been shown the letter because of his illness. Thereafter, Dottin wrote another letter to Compass Sales Corporation enclosing his bill for services, and informing defendant that he and Smith were in control of Master Service, Inc., and that if the foreclosure was revoked with Compass Sales Corporation regarding Smith's employment by it, that he and Smith were going ahead on their own account. Nothing further indicates that the purpose of terminating Smith's chattel mortgage on the property of the Master Service, Inc., was not to put this institution out of business, but to gain control of it for Smith.

Salkin testified that in January, 1930, Pickus called upon him in New York and asked him if a deal could be made to make it possible for him, plaintiff, to become associated with the Compass Sales corporation; that Pickus took Salkin to the plaintiff, Cottin, and introduced the two men; that he had a conversation with Frank O. Mayer, Secretary and Treasurer of the Compass Sales Corporation, in which Mayer stated that whatever expense up to $2,000 or $3,000 might be incurred in taking over Master Sales, Inc., the Compass Sales Corporation would pay. Mayer denied that any such agreement was made, and in this he is confirmed by Cottin, one of the plaintiffs, and Mayer testified that he had informed Salkin that no arrangement could be made until the president of the corporation, Pickus, who was then ill, had recovered his health. After all the work had been done, upon which plaintiffs' claim is based, plaintiff received a letter from defendant, Compass Sales Corporation, which letter was introduced in evidence by plaintiffs, to the effect that Pickus was still in the hospital and that he had been too ill to be informed as to what was going on or had taken place. Thereafter, plaintiff sent to defendant, Compass Sales Corporation, the bill for services, upon which this suit is based.

There are several reasons why the judgment should be reversed and the cause remanded. One is that from the testimony of one of the plaintiffs, Cottin, and from the testimony of Mayer, it appears that Salkin, while in Chicago, was definitely informed that the Compass Sales Corporation could not and would not enter into any agreement concerning the matter until Mr. Pickus, its president, had recovered his health and could be consulted. The services rendered by the plaintiffs were for Salkin alone, and it clearly appears from the record that the proceedings instituted for acquiring the property of the Master Service, Inc., were for Salkin's

Mulkin testified that in January, 1930, Hickox called upon him in New York and asked him if a deal could be made to make it possible for him, plaintiff, to become associated with the Compass Sales corporation; that Pickens took Mulkin to the plaintiff's office, and introduced the two men; that he had a conversation with Frank C. Hayes, secretary and treasurer of the Compass Sales Corporation, in which Hayes stated that whatever expense so to $2,000 or $2,500 might be incurred in taking over Hickox's rights, the Compass Sales Corporation would pay. Hayes denied that any such agreement was made, and in this he is confirmed by Hickox, one of the plaintiffs, and Hayes testified that he had informed Mulkin that no arrangement could be made until the president of the corporation, Pickens, who was then ill, had recovered his health. After all the work had been done, upon which plaintiffs' claim is based, plaintiff received a letter from defendant, Compass Sales Corporation, which letter was introduced in evidence by plaintiffs, to the effect that Pickens was still in the hospital and that he had been too ill to be informed as to what was going on or had taken place. Thereafter, plaintiff sued to defendant, Compass Sales Corporation, the bill for services, upon which this suit is based.

There are several reasons why the judgment should be reversed and the cause remanded. One is that from the testimony of one of the plaintiffs, Hickox, and from the testimony of Hayes, it appears that Mulkin, while in Chicago, was definitely informed that the Compass Sales Corporation would not and would not enter into any agreement concerning the matter until Mr. Pickens, its president, had recovered his health and could be consulted. The services rendered by the plaintiffs were for Mulkin alone, and it clearly appears from the record that the proceedings instituted for enjoining the property of the Hickox Service, Inc., were for Mulkin'

sole benefit in order that he might acquire control of that corporation which he did. Further than this, there is nothing in the record to indicate any joint liability on the part of Piskus and the Compass Sales Corporation. If there is any liability at all, it is that of the Compass Sales Corporation alone.

For the reasons indicated, this cause will be reversed and remanded.

REVERSED AND REMANDED.

WILSON, P.J. AND NEUHL, J. CONCUR.

man honestly in order that he might maintain unstained at this tribunal either which he did. Indeed then sir, there is nothing in the record to indicate any joint liability on the part of Klein and the Chicago Slide Corporation. If there is any liability at all, it is that of the Chicago Slide Corporation alone.

For the reasons indicated, this cause will be reversed and remanded.

REVERSED AND REMANDED.

KILBOW, P.J. AND McGAR, J. CONCUR.

35814

GATES AUDIT COMPANY, (Plaintiff) Appellee, v. Von WINKLER LABORATORIES, INC., (Defendant) Appellant.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

269 I.A. 650 2

Opinion filed Feb. 8, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago for $1,035 and costs in favor of plaintiff in a suit brought to recover for services rendered by plaintiff as auditor of accounts.

It is claimed by plaintiff that on November 19, 1928, an oral contract was entered into between the parties by the terms of which plaintiff was to make an audit of the books of the defendant covering a period beginning January 1, 1928, and ending November 19, 1928, and for such other period as might be arranged by the parties, and that the charges for such services were to be at the rate of $25 per day for each accountant engaged in the work, together with the necessary expenses in and about the work, and that such services were rendered in accordance with the terms of the contract.

In its affidavit of merits, defendant agrees substantially as to the general terms of the alleged contract, except that it is stated that the period involved was from January 1, 1928, to November 19, 1928, and no other; that the work was to be done in a manner satisfactory to defendant, and that no payment was to be made until the audit was completed; also that the audit has not been completed; that it was not done in a satisfactory manner, and that it is not indebted to plaintiff in any sum whatever.

Opinion filed Feb. 8, 1933

MR. JUSTICE WEBB DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the municipal court of Chicago for $1,000 and costs in favor of plaintiff in a suit brought to recover tax refunds received by plaintiff as auditor of accounts.

It is claimed by plaintiff that on November 19, 1928, an oral contract was entered into between the parties by the terms of which plaintiff was to make an audit of the books of the defendant covering a period beginning January 1, 1928, and ending December 19, 1928, and for such other period as might be arranged by the parties, and that the charges for such services were to be at the rate of $25 per day for each accountant engaged in the work, together with the necessary expenses in and about the work, and that such services were rendered in accordance with the terms of the contract.

In its affidavit of merits, defendant opposes substantially on the ground that of the illegal contract, except that it is stated that the period involved was from January 1, 1928, to December 19, 1928, and no showing that the work was to be done in a manner satisfactory to defendant, and that no payment was to be made until the audit was completed; also that the audit has not been completed; that it was not done in a satisfactory manner, and that it is not indebted to plaintiff in any sum whatever.

From the record it appears that on November 19, 1928, a meeting was had between one Von Borries, representing the plaintiff, and one Von Winkler, representing the defendant. Von Borries testified that Von Winkler desired an investigation to be made of the books of his company; that there was also present at this meeting one Doyle, also representing defendant; that at this meeting it was stated by Von Borries to Von Winkler and Doyle that the costs of the desired services would be $25 per day for each accountant furnished by plaintiff to do the work, and that Von Borries was told by Doyle to proceed with the audit. A letter from plaintiff to defendant was offered in evidence as a part of Von Borries' testimony, as follows:

"November 19, 1928.

Mr. Walter Von Winkler, President,
Winkler Chemical Manufacturing Co.,
22 West Kinzie St., Chicago, Ill.

Dear Sir:

Confirming our conversation of this morning, it is our understanding that we are engaged to make an investigation of your available accounts and records for a period beginning January 1, 1928 to date or such other period as may be arranged; also we are to render any such other accounting service as may be subsequently directed by you.

Our remuneration for this service is to be at the rate of $25.00 per day. It is also understood that you are to pay such expenses as may bennecessary in verifying accounts receivable and payable etc.

Thanking you for the engagement given, we assure you it shall receive our best attention.

Yours truly,

Gates Audit Co.,

By E. F. Von Borries."

Thereafter on November 20, 1928, a further talk was had between the parties, and as a result of such talk, on November 21, 1928, Von Borries sent the following letter:

From the record it appears that on November 10, 1922, a meeting was had between one Von Bortien, representing the plaintiff and one Von Vinkler, representing the defendant. Von Bortien testified that Von Vinkler desired an investigation to be made of the books of his company; that there was also present at this meeting one Doyle, also representing defendant; that at this meeting it was stated by Von Bortien to Von Vinkler and Doyle that the costs of the desired services would be $50 per day for each accountant furnished by plaintiff to do the work, and that Von Bortien was told by Doyle to proceed with the audit. A letter from plaintiff to defendant was offered in evidence as a part of Von Bortien's testimony as follows:

"November 12, 1922.

Mr. Peter Von Vinkler, President,
Vinkler Chemical Manufacturing Co.,
50 West Kinzie St., Chicago, Ill.

Dear Sir:

Confirming our conversation of this morning, it is our understanding that we are engaged to make an investigation of your available accounts and records for a period beginning January 1, 1920 to date or such other period as may be arranged; also we are to render such other accounting service as may be mutually agreed by you.

Our remuneration for this service is to be at the rate of $50.00 per day. It is also understood that you are to pay such expenses in our behalf as may be necessary in verifying accounts receivable and payable etc.

Thanking you for the engagement given, we remain
Yo. ly shall receive our best attention.

Yours truly,

Gates Audit Co.,

By E. C. Von Bortien,"

Thereafter on December 30, 1922, a further bill was had between the parties, and as a result of such bill, on December 21, 1922, Von Bortien sent the following letter

"November 21, 1928.

Mr. Edward V. Doyle and
Mr. Von Winkler, President,
Von Winkler Laboratories, Inc.
22 West Kinzie St., Chicago, Ill.

Dear Sirs:

Confirming our conversation of this morning, and supplementing our letter of the 19th instant to the Von Winkler Chemical Company, it is our understanding that we are engaged to make an investigation of your available accounts and records for a period beginning January 1, 1928 to date or such other period as may be arranged; also we are to render any such other accounting service as may be subsequently directed by you.

Our remuneration for this service is to be at the rate of $35.00 per day for each accountant. It is also understood that you are to pay such expenses as may be necessary in verifying account receivable and payable, etc.

Thanking you for engagement given, we assure you it shall receive our best attention.

Yours truly,

Gates Audit Company,

Signed by E. F. Von Borries."

The witness stated that he received no reply to the last letter.

One Burris, an auditor employed by plaintiff, testified that the audit of defendant's books and accounts began on November 19, 1928, and finished about December 15th of that year. In connection with Burris' testimony, records of the work performed by plaintiff, the time consumed, and the cost of the work, were offered and received in evidence. Also a letter from plaintiff to defendant with a report of the result of the audit. Various witnesses testified as to the number of hours that were employed on the work.

Walter T. Von Winkler, a witness for the defendant, testified that in his conversation with Von Borries on November 19,

November 23, 1970.

Mr. Edward F. Doyle and
Mr. Van Winkler, President,
Van Winkler Laboratories, Inc.
22 West Plaza Pl., Joliet, Ill.

Dear Sirs:

Confirming our conversation of this morning, and enclosing our letter of the 19th instant to the Shaler Chemical Company, it is our understanding that we are engaged to make an investigation of your available accounts and records for a partial delinquent account i.e. 1968 to date or such other period as may be assigned; also we are to insert any such other accounting errors as may be subsequently discovered by you.

Our remuneration for this service is to be at the rate of $75.00 per day for each accountant. It is also understood that you are to pay such expenses as may be necessary in verifying account receivable and payable, etc.

Thanking you for engagement given, we remain yo
it shall receive our best attention.

Yours truly,

Jones Audit Company,

Signed R. T. Jon Service

The letter which this is received as reply to the last letter,

Can Marks, an auditor employed by plaintiff, testified that the audit of defendant's books and accounts began on November 13, 1968, and finished about December 16th of that year. In connection with Burtle' testimony, records of the work performed by plaintiff, the time consumed, and the cost of the work, were offered and received in evidence. Also a letter from plaintiff to defendant with a report of the result of the audit. Various witnesses testified as to the number of hours that were employed on the work.

Walter T. Von Winkler, a witness for the defendant, testified that in his conversation with Van Winkler on November 13,

1928, it was stated by Von Morries that he, Von Morries, believed the work could be done by one accountant, and that the price would be $25 per day. This witness also testified that he did not know the number of hours plaintiff's representatives worked.

Defendant's principal contentions in its briefs are that more time was consumed in performing the work than was necessary; that under the contract all of the work was to be done and completed in the office of defendant, and that no time for work done after December 10th, should be charged but these are not the defenses set out in the affidavit of merits, nor are they supported by the testimony. It is contended by defendant that the oral instruction of the court was erroneous, in that the instruction left it to the jury to construe the contract:

> "If you believe that the contract was that the plaintiff was to be paid for this work regardless of where he did it, then, it is your duty to find a verdict for the plaintiff. If you believe the contract was that the plaintiff was to be only paid for the work that he did in defendant's laboratory, and not for any that he did in his office, if there was such agreement entered into and you are convinced from the preponderance of the evidence that was it, then of course, the plaintiff can only recover in accordance with the agreement that exists between the parties."

Even though the instruction was bad, in view of the fact that it does not appear from the record that plaintiff was to do the work in any particular place, it does not make the giving of it reversible error.

The jury heard the witnesses, and this court is of the opinion that the verdict was clearly within the range of the testimony. Therefore, the judgment of the Municipal Court will not be disturbed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

1088, it was stated by Von Dorrien that Dr. Von Dorrien, helped the work would be done by one accountant, and that the wife would do its per day. While witness also testified that he did not know the number of hours plaintiff's representatives worked.

Defendant's principal contentions in its brief are that more time was consumed in performing the work than was necessary; that under the contract all of the work was to be done and completed in the office of defendant, and that no time for work done after December 10th, should be charged; that there are not the differences set in the affidavit of merits, nor are they supported by the testimony. It is contended by defendant that the oral instruction of the court was erroneous, in that the instruction left it to the jury to construe the contract:

> "If you believe from the testimony in this case that the plaintiff was to be paid for this work regardless of where he did it, then, it is your duty to find a verdict for the plaintiff. If you believe the contract was that the plaintiff was to be only paid for the work that he did in defendant's laboratory, and not for any that he did in his office, if there was such agreement entered into, you are convinced from the preponderance of the evidence that's the case, the plaintiff was only entitled to recover in proportion of the evidence that was it, then of course, the plaintiff was only entitled to recover the with the agreement that exists between the parties."

Even though the instruction was bad, in view of the fact that it does not appear from the record that plaintiff was to do the work in any particular place, it does not make the giving of it reversible error.

The jury heard the witnesses, and this court is of the opinion that the verdict was clearly within the range of the testimony. Therefore, the judgment of the municipal court will not be disturbed.

Judgment affirmed.

[illegible], P.J., and [illegible], J., concur.

35861

PEOPLE OF THE STATE OF ILLINOIS, ex rel. OSCAR NELSON as Auditor of Public Accounts of the State of Illinois,

Complainant,

v.

PROGRESSIVE STATE BANK, et al,

Defendants.

JULIUS ROTH and ANNA ROTH,

Intervening Petitioners,

v.

CHICAGO TITLE & TRUST COMPANY, as Receiver, etc.

(Defendant) Appellee.

On Appeal of JULIUS ROTH, and JOSEPH HOFFSTADTER, Executor of the Last Will and Testament of Anna Roth, deceased.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

269 I.A. 650

Opinion filed Feb. 8, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court of Cook County, denying the relief prayed for by petitioners, appellants, set forth in the intervening petition filed by them in a proceeding brought by the People of the State of Illinois, ex rel, Oscar Nelson, Auditor of Public Accounts, against the Progressive State Bank, insolvent.

In this petition, it is alleged that Julius Roth and Anna Roth, his wife, were depositers in the Progressive State Bank in a joint savings account known as Julius and Anna Roth; that Julius Roth was a director in this bank, and that in July, 1929, the cashier of the bank told Roth it was necessary for the bank to immediately file its report with the Auditor of Public Accounts, and that in order to do so a certain overdraft of $3,513.74 of one of the depositers had

Opinion filed Feb. 8, 1933

MR. JUSTICE DUFF DELIVERED THE OPINION OF THE COURT:

This is an appeal from a decree of the Circuit Court of Cook County, denying the relief prayed for by petitioners, appellants and refusing the interventions filed by them in a proceeding brought by the people of the State of Illinois, ex rel. Omer Emmons, Auditor of Public Accounts, against the Intervening State Bank, Intervenor.

In this petition, it is alleged that Julius Rosenwald and Edith Rosenwald, his wife, were depositors in the Intervening State Bank in a joint savings account known as Julius and Jane Rosenwald; that Julius Rosenwald was a director in this bank, and that in July, 1928, the auditor of the bank told Julius it was necessary for the bank to immediately file its report with the Auditor of Public Accounts, and that in order to do so a certain warrant of $3,312.76 of one of the depositors had

Cause

PEOPLE OF THE STATE OF ILLINOIS, ex rel.
OMER EMMONS, Auditor of Public
Accounts of the State of Illinois,

Complainant,

v.

INTERVENING STATE BANK, et al.,

Defendants.

JULIUS ROSENWALD and EDITH ROSENWALD,

Intervening Petitioners,

v.

INTERVENING STATE BANK, an
Insolvent, etc.

(Defendant) Appellee.

Appeal of JULIUS ROSENWALD and EDITH ROSENWALD, Executors of the last will and testament of John Jones, deceased.

ORIGINAL TERM.

COOK COUNTY.

CHARLES A. SWANSON, Judge.

Decree affirmed.

to be paid, so that such overdraft would not appear in the report; that in order to remedy the situation, Julius Roth, without the knowledge or consent of Anna Roth, loaned said bank on the 5th day of July, 1929, the sum of $3,513.74, which was to be repaid by the bank to Julius and Anna Roth, petitioners in said petition, within a reasonable time thereafter, and that the Progressive State Bank was still indebted to the said petitioners in the sum mentioned with interest from July 5th, 1929. The petition recites that Anna Roth died October 25th, 1931, suggests her death, and prays that Joseph Hoffstadter, executor, be made party petitioner.

The prayer of the petition is that an order be entered permitting the petition to stand as a claim against the bank and, that an order be entered on the receiver of the bank to answer the petition.

To this intervening petition, the receiver of the bank, the Chicago Title & Trust Company, (appellee) filed its answer alleging that on July 5th, 1929, Julius Roth, one of the petitioners, withdrew from the joint account referred to the sum of $3,513.74, and that with this sum he purchased from the bank a cashier's check for the amount of the withdrawal, payable to Julius Roth; that the check was endorsed in blank by Julius Roth and Jacob Guthman, and that the check was paid by the Progressive State Bank, cancelled and delivered to it, and that the check was in the possession of the bank when it closed, and thus came into the possession of the receiver. It is further alleged in the answer of the receiver that the records of the bank do not disclose what use was made of the proceeds of the check, or that the bank became or is indebted to Roth. The answer denies that any such indebtedness exists. The account from which the money was drawn was the joint account of Julius and Anna Roth, and under their agreement with the bank,

to be paid, on that such overdraft would not appear in the property; that in order to remedy the situation, Julius Roth, without the knowledge or consent of Anna Roth, issued said bank on the 5th day of July, 1922, the sum of $2,412.74, which was to be repaid by the bank to Julius and Anna Roth, petitioners in said petition, within a reasonable time thereafter, and that the respective claim bank was still indebted to the said petitioners in the sum mentioned with interest from July 5th, 1922. The petition recites that Anna Roth died October 20th, 1923, survivor her death, and prior thereto notifiedthe, executor, to make party petitioner.

The prayer of the petition is that an order be entered permitting the petition to stand as a claim against the bank and, that an order be entered on the receiver of the bank to answer the petition.

To this intervening petition, the receiver of the bank, the Citizens State Bank, (on April 1, 1924) filed its answer alleging that on July 5th, 1922, Julius Roth, one of the petitioners, withdrew from the joint account referred to the sum of $2,412.74, and that with this sum he purchased from the bank a cashier's check for the amount of the withdrawal, payable to Julius Roth; that the check was endorsed in blank by Julius Roth and delivered, and that the check was paid by the respondent State Bank, accepted and delivered to it, and that the check was in the possession of the bank when it closed, and thus came into the possession of the receiver. It is further alleged in the answer of the receiver that the records of the bank do not disclose what was made of the proceeds of the check, or that the bank became or is indebted to Roth. The answer denies that any such interest exists. The account from which the money was drawn was the joint account of Julius and Anna Roth, and under their agreement with the bank,

either of such persons were empowered to draw any or all of the sums in the account.

Julius Roth testified that on the day on which the check was drawn, he had a conversation with Gershon Guthman, President, and Fred Block, Vice President of the bank, in which Roth stated that the cashier, Munch, had requested Roth to advance the sum of $3,513.74 to take up the overdraft of Guthman, the President, and Block, the Vice President, which were being carried as cash, and that these men agreed that if Roth would take up these items, the bank would reimburse him in the next couple of months; that he thereupon withdrew from the joint savings account of Julius and Anna Roth the sum of $3,513.74 and received a cashier's check in exchange, and that he endorsed and delivered this latter check to the Assistant Cashier. The check was afterwards delivered to and endorsed by Guthman and paid by the bank. The witness further stated that in a conversation with these men, it was stated to him that the items of overdraft mentioned and which were being carried by the bank as cash items had to be paid so that a report of the bank's condition could be made to the Auditor of Public Accounts. He further stated that no evidence of the transaction in question was asked for by him or given. These so-called overdraft items held by the bank as cash were made up of worthless checks and other documents indicating the indebtedness of various officers of the bank to the bank in the amount of the check given by Julius Roth.

It is the theory of the respondent, the receiver of the Progressive State Bank, that any alleged agreement by the Guthmans and Blocks that the amount so advanced would be paid, is not binding upon the bank or its receiver. Roth was a director of the now insolvent bank. If everything he says is true, it becomes apparent that he was a party to the conspiracy to make a false statement of

either of such persons were suspected to have any or all of the sums in the account.

Julius Roth testified that on the day on which the check was drawn, he had a conversation with Gershon Goldman, President, and Fred Moor, Vice President of the bank, in which both stated that the maker, Hamer, had requested Roth to advance the sum of $2,012.74 to pay off the overdraft of Hamer. The President, and Moor, the Vice President, which were being carried as such, and that these men agreed that if Roth would make so these loans, the bank would reimburse him in the next couple of months; that he thereupon withdrew from the joint savings account of Julius and Anna Roth the sum of $2,012.74 and received a cashier's check in exchange, and that he endorsed and delivered this letter check to the President Cashier. The check was afterwards delivered to and endorsed by Goldman and paid by the bank. The witness further stated that in a conversation with these men, it was stated to him that the items of overdraft mentioned and which were being carried by the bank as cash items had to be paid to that a report of the bank's condition could be made to the Auditor of Public Accounts. He further stated that on evidence of the transaction in question was made for by him or given. Those so-called overdraft items held by the bank as cash were made up of worthless checks and other documents indicating the indebtedness of various officers of the bank to the bank in the amount of the check given by Julius Roth.

It is the theory of the respondent, the president of the Progressive State Bank, that any illegal agreement by the Goldman and Moore that the amount so advanced would be paid, is not binding upon the bank or its receiver. Roth was a director of the new Lansdowne bank. If everything he says is true, it becomes apparent that he was a party to the conspiracy to make a false statement of

the condition of the bank to the Auditor of Public Accounts. If the bank owes him the money, the bank's statement of the amount owed by it at the time the statement was made was necessarily false. It needs no citation of authority to show that he has no standing in a court of equity. If the court should order the claim to be allowed, it would be at the expense of the creditors of the bank, to whose deception as to the bank's condition he was a party. Anna Roth or her executor cannot complain for the reason that it is not disputed that the account from which the money was drawn was a joint account of Julius and Anna Roth, and that Julius Roth had the right to make the withdrawal.

The decree of the Circuit Court is affirmed.

AFFIRMED.

WILSON, P.J. AND MESSEL, J. CONCUR.

the condition of the bank to the auditor of public accounts. If he had seen his the money, the bank's statement of the account sent by it at the time the statement was made was necessarily false. It needs no citation of authority to show that he is no standing in a court of equity. If the court should order the claim to be allowed, it would be at the expense of the creditors of the bank, to whose description as to the bank's condition he was a party. Lake Ash or her counsel cannot complain for the reason that it is not disputed that the account from which the money was drawn was a just account of Julius and Isaac Ash, and that Julius Ash had the right to make the withdrawal.

The decree of the circuit court is affirmed.

AFFIRMED.

KIRKE, J.I. (ID EACH), J. DISSENT.

55884

CANADA CASING COMPANY, a Corporation,
Appellee,

v.

UNION PRODUCTS COMPANY, a Corporation,
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

Opinion filed Feb. 8, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County in favor of plaintiff (appellee) for the sum of $1,365.61, in a suit on a contract alleged to have been made between the parties, by the terms of which it is charged that the defendant agreed to resurface the floor of plaintiff's plant in the city of Chicago under certain guarantees and conditions, and that defendant failed to perform its contract as agreed, to the damage of plaintiff in the amount of the judgment. The case was submitted to a jury, and upon the verdict of the jury the judgment appealed from was entered.

The evidence shows that plaintiff, by L. E. Mountcastle, its president, signed a document dated July 30th, 1928, in which it is recited that plaintiff purchased from the Union Products Company, defendant, 10 barrels of "Fibrated - Lifekote Unicrete, 721 F, and 1 barrel of Non-Fibrated Lifekote 721 C" for $825.00 less a 10% discount of $82.50, making a net price of $742.50. The document also recites the following: "Above material to be applied on second floor of plant, Masthom, Melvin & Yeager, Inc., Contractors to Furnish Labor, Equipment, Cement and Sand, work to start *** Friday, August 30th, 1928, for the sum of $500.00." These statements are written or printed on an order blank furnished by defendant and directed to it. This document is also signed: "Salesman's Signature - T. G. Burns." A photostatic copy of this instrument is in the record, and other than the signatures, all the words and figures thereon are in bold type, partly printed and partly typewritten,

Opinion filed Feb. 8, 1952

with the exception that in the lower portion thereof in very small and indistinct type appears the following:

"CONDITIONS

"Execution of this order is contingent upon strikes, accidents and all delays unavoidable or beyond our control. This order is placed with the understanding that it is not subject to change or countermand after shipment has been made. No representations, agreements or promises of salesman, (not appearing on the original of this order) whether verbal or in writing shall be valid, except when confirmed in writing by the Company. Salesmen shall make no collections without first showing written authority from the Company. Covering capacity estimated, never guaranteed. All checks payable to The Union Products Company, Cleveland, O."

There was also received in evidence a document typed on a letterhead of defendant company and signed by L. S. Capers, Chicago District Manager, as follows:

"Paints, Enamels and Waterproofings
Industrial Maintenance Products For Every Surface and Purpose.
L. S. Capers
Chicago District Manager
Phone Superior 9066

THE UNION PRODUCTS COMPANY
Established 1900

Representatives Everywhere
Laboratories
Factory and General Offices
CLEVELAND, OHIO
Chicago Office and Warehouse
427 W. Erie Street

July 26, 1928

Pltfs X 5 adm.

Canada Casing Company,
825 West 47th Street,
Chicago, Illinois

Attention: Mr. M.E.Mountcastle, Pres.
Mr. Jas. Murray, Sect. & Treas.

Gentlemen:

Re: Resurfacing with Lifekote Unicrete, Second Floor of your plant at 825 West 47th Street, Chicago, Illinois, approximately 4200 Sq. Ft.

The Union Products Company will guarantee material against Cracking, Leaking and General Deterioration for a period of three years. Should any of above conditions appear within that period, we will furnish material "Free of Charge", to recover surface where same appears.

Also labor T.G.Burns

It is understood Hasthom, Melvin & Yeager, Inc., will install this floor or contractor as approved by the Union Products Company, installation will be supervised by Mr. T. G. Burns, or a Representative of the Union Products Company.

Yours very truly,

UNION PRODUCTS COMPANY
By: L. S. Capers,
CHICAGO DISTRICT MANAGER."

with the exception that in the lower portion thereof is very small and indicating type appears the following:

"WARNING:

Reproduction of this copy is conditioned upon adhering to conditions and all duties specified in lease and contract. This copy is placed with the understanding that it is not intended to change or modify other strict and exact terms. In representations, warranties or promises or intended, that regarding on the original of this copy, should be written and signed by the company. Alterations shall make no substitution without first showing written consent from the company. Inserted objects cannot be guaranteed. All change requests to the terms contained herein, illegal, c."

There was also received in evidence a document type on a letterhead of defendant company and signed by L. . Jepsen, Internal Sales Manager, as follows:

"Kiddie, Tassels and
Bubbleworldgum
Industrial Relations
Products for Peep
Shows and Arcades.
P. O. Box
Chicago 1, Illinois
Phone Jackpot 5000

Jepsen Vending Company
Sales Division
Jackpot Building
Jackpot, Nevada

Gentlemen:

We henceforth will introduce Gumballs
Second floor of your plant in the year 1976 [illegible],
Chicago, Illinois, approximately 4000 lb. ft.

The Union Pacific Company will guarantee material against breakage, leaking and general deterioration for a period of three years. Should any of above conditions apply within that period, we will furnish material free of charge, to remove defective whose more objects.

Also labor T.G.Thane
If is guaranteed Gumballs, Kiddie & Tassels, Inc., will install this floor on conversion in approved of the Union Products Company. Installation will be supervised by Mr. T. G. Smith, be a representative of the Union Products Company.

Yours very truly,

Kiddie Products Company
By: L. J. Jepsen,
Service Director R.S.S.T."

The defendant's theory of the case, as expressed in its brief, is that the contract was accepted by the plaintiff about August 5th, 1928; that the "letter of guarantee" referred to in defendant's brief as hereinbefore set forth, was executed on July 26th, 1928; that any agreement contained therein became merged into the contract; that L. A. Capers had no authority to sign this letter, and that the words "also labor" were placed on the letter after it was written without defendant's sanction. Defendant tacitly admits that if this letter is to be considered as a part of the contract, plaintiff's position is well taken.

Thomas G. Burns testified on behalf of plaintiff that he was a salesman for the Union Products Company, defendant, and that Capers was the District Sales Representative of this company; also that he, Burns, placed the words "also labor" on the letter of July 26th, 1928, on July 27th, 1928, and that the plaintiff refused to give the order until such words were added to the letter.

M. E. Mountcastle, president of plaintiff company, testified that Burns, salesman for defendant, showed him, Mountcastle, the "letter of guarantee" referred to, and that he would not give Burns the order for the floor unless the words "and labor" were made a part of such document; that these words were added on July 26th or 27th, 1928, and that the order was given two weeks or ten days later.

Burns, the salesman for the defendant company, as a witness for plaintiff, testified that he solicited plaintiff for the purpose of selling its product to plaintiff, and that he placed the words "also labor" on the letter referred to as the "letter of guarantee" at the solicitation of Mountcastle. As stated, defendant's defense is based upon the alleged fact that the contract between the parties was signed on August 5th, 1928, subsequent to the so-called "letter of guarantee", and that this letter is of no

The defendant's theory of the case, as expressed to the jury, is that the amendment was accepted by the plaintiff about August 8th, 1908; that the "letter of guarantee" referred to in paragraph 4 of the defendants's set forth, was executed on July 8th, 1908; that any agreement contained therein became binding in the contract; that L. E. Sayers had no authority to sign this letter, and that the words "also labor" were placed on the letter after it was written without defendant's consent. Defendant further claims that if this labor is to be considered as a part of the contract, plaintiff's position is well taken.

Thomas S. Moore testified on behalf of plaintiff that he was a salesman for the Tulsa Concrete Company, Defendant, and that Sayers was the district sales representative of this company; that he, Moore, placed the words "also labor" on the letter of July 8th, 1908, on July 8th, 1908, and that the plaintiff refused to give the order until such words were added to the letter.

E. E. Sweezeville, president of plaintiff company, testified that Lord Dunne, salesman for defendant, showed him, Sweezeville, the "letter of guarantee" referred to, and that he could not give Dunne the order for the floor unless the words "and labor" were made a part of such document; that these words were added on July 8th or 9th, 1908, and that the order was given two weeks or ten days later.

Dunne, the salesman for the defendant company, in a rebuttal for plaintiff, testified that he solicited plaintiff for the purpose of selling the product to plaintiff, and that he placed the words "also labor" on the letter referred to as the "letter of guarantee" in the solicitation of contract. On March, defendant's witness claims to have seen the change that had the effect to change the letter was placed on August 8th, 1908, whereas in the "letter of guarantee", the date this letter is of is

avail because everything leading up to the execution of the contract was merged into it. We find nothing in the record to support defendant's position except Mountcastle's testimony that the order was given 10 days after July 26th or 27th, 1928. After the signing of the original order, various negotiations were had between the parties, apparently resulting in the letter dated July 26th, 1928, signed by Capers, the district manager, and thereafter at Mountcastle's request the addition of the words "also labor" were written on this document by Burns.

There was offered and received in evidence a contract of employment made between defendant company and Capers, who wrote the "letter of guarantee", which defendant claims limited Capers' authority. It is not shown that this contract ever came to the notice of plaintiff.

In view of the position taken by defendant, it is a significant fact that in the original abstract filed by it, the printed copy of the letter written by Capers does not show Capers' signature, nor the printing on this letterhead, "L. B. Capers, Chicago District Manager," nor the words "also labor" as shown by the document introduced in evidence, and that appellee was compelled to file an additional abstract with a photostatic copy of this letter showing the things referred to. All the negotiations and correspondence between the parties were with Capers and Burns. There is no doubt as to Capers' authority, and as to Burns, the record shows that defendant attempted to complete or make perfect its work, including labor, as the "letter of guarantee" agreed it would do, thus indicating that it considered itself bound by the agreement made in this letter. The original order, the "letter of guarantee", and the conduct of the parties must be considered together in determining what the agreement of the parties was.

In Faber-Musser Co., v. William E. Dee Clay Mfg. Co., 291

will become very-thing looking as to the economics of the contract was merged into it. We find nothing in the record to support defendant's position except Montgomery's testimony that the order was given 10 days after July 28th or 29th, 1930. After the signing of the original order, various supplies and work had become the subject, apparently resulting in the letter dated July 28th, 1930, signed by Sigmund the director manager, and therefore if Montgomery's recall the addition of the words "also labor" were written on his document by mistake.

There was offered and received in evidence a contract or employment made between defendant company and Sigmund, who wrote the "letter of guarantee", which defendant claims limited Sigmund's liability. It is not shown that this contract was made in the course of plaintiff.

In view of the position taken by defendant, it is a significant fact that in the original abstract filed by it, the typed copy of the letter written by Sigmund was not upon Sigmund's stationery, nor the printing on this letterhead, "L. S. Sigmund, Chicago District Manager," nor the words "also labor" as shown by the Sigmund's letterhead in evidence, and that typewriting was compelled to file an additional abstract with a photostatic copy of this letter showing the things referred to. All the negotiations and correspondence between the parties were with Sigmund and Burns. There is no doubt in to Sigmund's authority, and as to Burns, the record shows that defendant attempted to complete or make perfect its work, including labor, as the "letter of guarantee" agreed to work for, thus indicating that it considered itself bound by the agreement made in this letter. The original order, the "letter of guarantee", and the contract of the parties must be considered together in determining what the agreement of the parties was.

In Fuller-Warren Co., v. Illinois R. Man Ins. Co., 161

Ill. 240, the court said:

> "While it is true, as argued by counsel for appellee, that the declarations of an alleged agent are of themselves incompetent to prove agency, they are admissible against the principal to show the extent of his authority as such agent; and this includes also written statements by the agent contained on letters or letter-heads or receipts. (2 Corpus Juris, 930.) But it is also true that the fact of agency or the nature or extent of authority may be established by parol evidence. Circumstancial evidence is ordinarily competent to establish the fact or extent of agency. (2 Corpus Juris, 944.) In case of doubt as to the extent of the agency and the authority of the agent to bind the principal, 'reference may be had to the situation of the parties and property, usages of the country on such subjects, the acts of parties themselves, and any other circumstances having a legal bearing and throwing light on this question.' (21 R.C.L. 882.) There is no question on this record as to the agency of Matthew M. Dee for the appellee company. The only question in that respect is as to the extent of his agency, and under the authorities just cited the letter-heads used by appellee's agent at the Springfield office were admissible in evidence to show the extent of such agency."

We are of the opinion that the letter of July 26th, 1928, including the words "also labor", alleged to have been written thereon by Burns, became and was a part of the contract between the parties, and established the obligation undertaken by defendant. On the question of damages, in view of the fact that the jury passed on the question and that their verdict is within the range of the testimony, this court will not disturb such verdict.

AFFIRMED.

WILSON, P.J., AND HEBEL, J, CONCUR.

III. and, the court said:

> "While it is true, as argued by counsel for petitioner, that the instruction is an alleged error of commission as opposed to proper omission, they are relatable to the same general rule, and the issues of the admissibility of this evidence are not separable. Evidence also written evidence by the agent relating to letters or letter-books or re-ceipts. (2 Greenl. Evid., 288.) And it is also true that the fact of agency or the nature or extent of authority may be established by general evidence. Circumstantial evidence is ordinarily sufficient to establish the fact or extent of agency. (2 Greenl. Evid., 262.) The rule of evidence as to the extent of the agency and the authority of the agent to bind the principal, testimony may be had to the attitude of the parties and generally, verges of the authority on such subjects, the rule of proving therefore, and any other circumstances having a logical bearing upon the question." (2 Greenl. Ev.) Thus, in the instant case the question of the agency or authority of the agent, or the apparent, or the ratification by the principal, the only question in this respect is as to the extent of the agency, under the instructions that gives the jury-the agent's agent of the particular office was authorized to contract on the extent of such agency.

We are of the opinion that the letter of July 20th, indicating the words "also labor", alleged to have been written thereon by Greene, bonne and was a part of the contract between the parties, and established the obligation undertaken by defendant. In the absence of duress, in view of the fact that the jury passed on the question and that their verdict in which the judge of the territory, this court will not disturb such finding.

AFFIRMED.

FLEMING, V.C., DOE EVANS, J., concur.

36139

53

WOJCIECH ANTOSAK, Defendant in Error, v. One Mrs. Majewski, doing business as WHITE STAR BAKERY, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

269 I.A. 649

Opinion filed Feb. 8, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his statement of claim in the Municipal Court of Chicago alleging that there was $69.70 due him as wages and that he was entitled to $20 as reasonable attorney's fees; that a wage demand for payment had been made and refused and asked judgment in the amount of $89.70. Summons issued and served and a trial was had before the court without a jury on February 10, 1932, resulting in a finding of the issues in favor of the plaintiff and damages assessed at the sum of $89.70 and judgment entered for this amount. Defendant made a motion for a new trial which was overruled. Defendant prayed an appeal and was granted leave to file a bill of exceptions within 60 days. No bill of exceptions was filed. March 8, 1932, defendant made a written motion to vacate the judgment. The grounds of the motion appear to have been based upon newly discovered evidence and the motion was preserved by a bill of exceptions which is included in the record filed in this court.

It is insisted that the judgment is erroneous in that the trial court should have made two separate findings, one for the amount of wages due and one for the attorney's fees taxed as costs, and further that the act Chap 13 P. 14, Cahill Rev. Stat., providing for attorneys fees provides that such attorney's fees

Opinion filed Feb. 8, 1932

are collectible only in actions brought before a justice of the peace, in the County Court and in the Circuit Court and that no provision is made for the assessment of attorney's fees as damages in the Municipal Court of Chicago. The action, however, is one of the fourth class and in such cases the pleadings are not controlling but the action is such as the evidence makes it. On its face the judgment is regular and every intendment should be indulged in favor of its validity. There being no bill of exceptions showing what took place at the trial, it may be that the judgment was for wages only and no provision made for attorney's fees. Moreover, there is nothing in the record to show that the question was preserved at the trial either by objection to the evidence, if any, as to attorney's fees, or as to their inclusion in the finding and judgment. Neither is there any objection to the judgment because of the inclusion of attorney's fees in the motion made to vacate the judgment. The proceeding on the trial not being preserved, the regularity of the judgment will be presumed. The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

are collectible only in actions brought before a justice of the peace, in the County Court and in the circuit Court and that no provision is made for the assessment of attorney's fees as costs in the municipal Court of Chicago. The action, however, is one of the fourth class and in such cases the pleadings are not controlling but the action is such as the evidence makes it. On its face the judgment is regular and every intendment should be indulged in favor of its validity. There being no bill of exceptions showing what took place at the trial, it may be that the judgment was for wages only and no provision made for attorney's fees. However, there is nothing in the record to show that the question was presented at the trial either by objection to the evidence, if any, as to attorney's fees, nor as to their inclusion in the finding and judgment. Neither is there any objection to the judgment because of the inclusion of attorney's fees in the motion made to vacate the judgment. The proceeding on the trial not being preserved, the regularity of the judgment will be presumed. The judgment of the municipal Court of Chicago is affirmed.

Affirmed.

WERNER, P.J., dissenting.

38202

INTERNATIONAL GENEVA ASSOCIATION OF CHICAGO, ILLINOIS, a corporation,

Appellant,

v.

GEORGE W. SCHWARTZ, Trading as GEORGE W. SCHWARTZ & COMPANY,

Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

269 I.A. 649

Opinion filed Feb. 8, 1933

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Complainant's bill of complaint alleges that it is a corporation and in the month of January, 1923, employed the defendant to audit its books for the year ending December 31, 1922; to make quarterly audits of said books for the year 1923, and to design and install a set of books to be used by the complainant; that the complainant agreed to pay defendant for said services the sum of $75 for the audit for the year 1922; the sum of $100 for the installation of said books and the further sum of $240 for auditing the books for the year 1923; that pursuant to said agreement complainant delivered its books to the defendant for the purpose of making said audit, but that the defendant submitted what purported to be an audit of said books, but that it was incorrect and incomplete; that the complainant paid to the defendant the sum of $75 and tendered the sum of $160 in full payment for services rendered, but the defendant claimed an additional sum and refused to surrender possession of the books and records of the complainant. Complainant tenders the sum of $160 in open court and avers that it is ready and willing to do equity and prays that the defendant may be required to prove his claim, if any, over and above the said sum of $160 and

Opinion filed Feb. 8, 1923

Complainant's bill of complaint alleges that it is a corporation and in the month of January, 1921, employed the defendant to audit its books for the year ending December 31, 1920; to make quarterly audits of said books for the year 1921, and to design and install a set of books to be used by the complainant; that the complainant agreed to pay defendant for said services the sum of $75 for the audit for the year 1920; the sum of $100 for the installation of said books and the further sum of $240 for auditing the books for the year 1921; that pursuant to said agreement complainant delivered its books to the defendant for the purpose of making said audit, but that the defendant wholly also neglected to be an audit of said books, but that it was incorrect and incomplete; that the complainant paid to the defendant the sum of $75 and tendered the sum of $120 in full payment for services rendered, but the defendant claimed an additional sum and refused to surrender possession of the books and records of the complainant. Complainant tendered the sum of $120 in open court and avers that it is ready and willing to do equity and prays that the defendant may be required to prove his claim, if any, over and above the said sum of $120 and

that he be directed to deliver to the complainant the said books and records.

The answer of the defendant admits the employment and the rec ipt of the money charged to have been paid, but denies that he furnished an inadequate and incomplete set of books and says that there is due him, the defendant, the sum of $875 and prays that the complainant be ordered and directed to pay him the sum of $875 due for said services.

The cause was heard in open court by the chancellor on evidence produced, and a decree entered in favor of the defendant and against the complainant and finds:

> "That the Court has jurisdiction of the subject matter of this cause and the parties hereto.
> The Court further finds that all the equities are with the defendant, George W. Schwartz and that the complainant is indebted to the said George W. Schwartz, the defendant, in the sum of Eight Hundred Seventy-five Dollars ($875.00)."

The decree further provided that the defendant have execution for said amount together with the statutory interest thereon.

The matter comes before this court on appeal based upon a praecipe record, consequently, every intendment will be indulged in favor of the decree in so far as the testimony and the pleadings not included in the praecipe record are concerned.

It is insisted on behalf of the complainant:

(a) That the decree should be supported by a certificate of evidence, or contain a finding of fact sufficient to sustain it; and

(b) That affirmative relief cannot be granted under an answer.

The entire record not being before us, it will be presumed that a certificate of the evidence is on file and, consequently, part of the record of the cause.

that he be directed to deliver to the complainant the said books and records.

The answer of the defendant admits the employment and the receipt of the money charged to have been paid, but denies that he furnished an inadequate and incomplete set of books and says that there is due him, the defendant, the sum of $872 and prays that the complainant be ordered and directed to pay him the sum of $872 due for said services.

The cause was heard in open court by the chancellor on evidence produced, and a decree entered in favor of the defendant and against the complainant and finds:

> "That the Court has jurisdiction of the subject matter of this cause and the parties hereto.
>
> The Court further finds that all the allegations are with the defendant, George R. Schwartz and that the complainant is indebted to the said George R. Schwartz, the defendant, in the sum of Eight Hundred Seventy-five Dollars ($875.00)."

The decree further provided that the Defendant have execution for said amount together with the statutory interest thereon.

The matter comes before this court on appeal based upon a proper record. Consequently, every intendment will be indulged in favor of the decree in so far as the testimony and the findings not included in the pertinent record are concerned.

It is insisted on behalf of the complainant:

(a) That the decree should be supported by a preponderance of evidence, or contain a finding of fact sufficient to sustain it and

(b) That affirmative relief cannot be granted under an answer.

The entire record not being before us, it will be presumed that a certificate of the evidence is on file and, consequently, part of the record of the cause.

In the case of Day v. Davis, 213 Ill. 53, the court in its opinion, says:

> "The proceeding being in chancery, the rule is that the decree must be supported either by a certificate of the oral evidence heard in the cause, or by recitals in the decree of the facts found by the court to be established by the evidence. The decree does not recite the facts established by the evidence. Whether a certificate of such proof is on file, and consequently a part of the record of the cause, we cannot know, for the plaintiff in error has chosen not to bring the entire record before us. We know from so much of the record as we have, that the court heard oral testimony on the question whether it would be for the best interests of those interested that the bid of the Assets Realization Company should be accepted, and that the proofs thus heard operated to convince the mind of the chancellor that the bid should be approved and the property disposed of accordingly. The proof may, for aught we know, have been incorporated in a certificate of evidence, and if so, it composes a part of the record of the cause. While it was not the duty of the plaintiff in error to see that the oral proof was preserved either by a certificate of evidence or by a recital of findings in the decree, it was his duty to bring before us all that is in the record on that point before he can ask us to declare that the chancellor erred in ordering that the property should be sold. If we had a complete record of the cause before us and it should not appear from it that the oral evidence had been preserved, then, unless the decree contained recitals of findings of fact sufficient to sustain the relief granted, the plaintiff in error might insist upon a reversal. In the absence of a complete record no presumption of error obtains, but the presumptions are in favor of regular and correct action on the part of the chancellor."

To the same effect see Metropolitan Trust & Savings Bank v. Perry, 194 Ill. App. 277.

The issues involved were simple and the question was whether or not the complainant was indebted to the defendant. The complainant offered to do equity in its bill and prayed, "that the defendant be required to prove his claim, if any, over and above the sum of $160." This amounted to a prayer for an accounting. The court in its decree found the ultimate fact, namely, that the complainant was indebted to the defendant together with the amount of such indebtedness. It is not necessary to set out the evidence in a decree, but only such

In the case of Day v. Davis, 322 Ill. 83, the court

in its opinion, said:

"The proceeding being in chancery, the rule is that the decree must be supported either by a certificate of the oral evidence heard in the cause, or by recitals in the decree of the facts found by the court to be established by the evidence. The decree does not recite the facts established by the evidence. Neither a certificate of such proof is on file, and consequently a part of the record of the cause, we cannot know, for the plaintiff in error has chosen not to bring the entire record before us. We know from no such of the record as we have, that the court heard oral testimony on the question whether it would be for the best interests of those interested that the bid of the Lincoln Realization Company should be accepted, and that the proofs that heard operated to convince the minds of the chancellor that the bid should be approved and the property disposed of accordingly. The proof may, for aught we know, have been incorporated in a certificate of evidence, and if so, it compares a part of the record of the cause, while it was not the duty of the plaintiff in error to see that the oral proof was preserved either by a certificate of evidence or by a recital of findings in the decree. It was his duty to bring before us all that is in the record on that point before he can ask us to declare that the chancellor erred in ordering that the property should be sold. If we had a complete record of the cause before us and it should not appear from it that the oral evidence had been preserved, that, under the latter authority, recitals of findings of fact sufficient to sustain the relief granted, the plaintiff in error might insist upon a reversal. In the absence of a complete record no presumption of error obtains, but the presumptions are in favor of regular and correct action on the part of the chancellor."

In the case cited by Petitioner Ford v. Ferris, 324 Ill. App. 277.

The issues involved were simple and the question was whether or not the complainant was indebted to the defendant. The complainant offered to do equity in the bill and proved, "that the defendant be required to prove his claim, if any, and show the sum of $150." This amounted to a prayer for an accounting. The court in its decree found the ultimate fact, namely, that the complainant was indebted to the defendant together with the amount of such indebtedness. It is not necessary to set out the evidence in a decree, but only such

ultimate facts as are deducible from the evidence heard by the court. It appears from the decree that the court heard evidence and found the ultimate fact to be that the complainant was indebted to the defendant. The Supreme Court in the case of Koch v. Arnold, 242 Ill.208, in its opinion, said:

> "It is not, however, necessary that all the evidence by which the facts were proved should be set forth in the record. If it appears that the court, from the evidence before it, found the ultimate facts justifying the relief granted, it is sufficient. The decree need not recite subsidiary or evidentiary facts tending merely to sustain the ultimate conclusion of fact upon which the decree is founded. A general finding of the fact is enough, and it is not necessary to find minutely all the circumstances tending to sustain the general finding, for these circumstances are matters of evidence only. Almost any statement of fact may be shown by a refined analysis to depend upon an inference to be drawn from other facts and to require the application of legal rules in making the deduction."

To the same effect see Gann, et al v. Hughes, 201 Ill. App. 603.

In regard to the proposition that affirmative relief cannot be granted under an answer,- as a general rule this is correct, but in the case at bar the complainant asked the court to find what, if anything, was due defendant. This amounted to a prayef for an accounting. The defendant in his answer prayed that the complainant be directed to pay him the amount due. It is the rule that upon a billoin equity for an accounting, the party against whom the balance is found, will be decreed to pay it and that no cross-bill is necessary. Thomas v. Turner, 157 Ill. 16; House v. John Linn & Co., 179 Ill. App. 114.

This court is not called upon to pass upon the weight of the evidence nor to consider it and, on the record as it is before us, we find no error and therefore the decree will be and is affirmed.

DECREE AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

ultimate facts as are deducible from the evidence heard by the court. It appears from the decree that the court heard evidence and found the ultimate fact to be that the complainant was indebted to the defendant. The Supreme Court in the case of Ross v. Lansing 242 Ill.,502, in its opinion, said:

> "It is not, however, necessary that all the evidence by which the facts were proved should be set forth in the record. If it appears that the court, from the evidence before it, found the ultimate facts justifying the relief granted, it is sufficient. The course and of proof subsidiary or evidentiary facts tending merely to sustain the ultimate conclusion of fact upon which the decree is founded. A general finding of the fact is merely, and it is not necessary to find separately all the subsidiary facts tending to sustain the general finding. For these elementary rules are matters of evidence only. Almost any statement of fact may be shown by a proper analysis to depend upon an inference to be drawn from other facts and to require the application of legal rules in making the deduction."

To the same effect see Dunn, et al v. Hughes, 241 Ill. 190, 202.

In regard to the proposition that affirmative relief cannot be granted under an answer,- as a general rule this is correct, but in the case at bar the complainant asked the court to find what, if anything, was due defendant. This amounted to a prayer for an accounting. The defendant in his answer prayed that the complainant be directed to pay him the amount due. It is the rule that upon a bill in equity for an accounting, the party against whom the balance is found, will be decreed to pay it and that no cross-bill is necessary. Thomas v. Tucker, 187 Ill. 141; Dunn v. John Sick & Co., 177 Ill. 490, 114.

This court is not called upon to pass upon the weight of the evidence nor to consider it and, as the record as it is before us, we find no error and therefore the decree will be and is affirmed.

DECREE AFFIRMED.

MCCOMB, J. and HAIR, J., DISSENT.

35763

MINNEAPOLIS LARABEE FLOUR COMPANY, a corporation,

Appellee,

v.

I. BERGER,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

269 I.A. 649[3]

Opinion filed Feb. 8, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago in favor of plaintiff (appellee) in an action brought against defendant to recover for an alleged balance due for flour sold by plaintiff to defendant. The cause was submitted to a jury, which found for plaintiff, upon which verdict the judgment was entered.

The plaintiff's claim is that during the year 1930, it shipped flour to defendant upon an open account, and that the amount due to plaintiff on April 24th, 1930, was $1,787.15; that on September 2nd, 1930, a stated account was agreed to by the parties and that on that date the sum of $891.25 was paid on account, leaving a balance due of $895.90.

Defendant claims that much of the flour shipped was of an inferior quality, and that portions of it were not usable; that on September 2, 1930, after a controversy with plaintiff's agent over the quality of the flour, it was agreed between them that an allowance be made to defendant on account of the flour that was not usable and for loss in labor and materials in connection therewith, and that plaintiff agreed to and did accept the sum of $891.25, in full of all claims; that such payment was made by a check on which was endorsed on the back thereof "In full payment and satisfaction of all claims and demands to date". It is claimed by plaintiff that this check was a payment on account, and that the words "In

Opinion filed Feb. 8, 1933

Appeal from the Municipal Court of Chicago.

Appellee,

v.

I. MONDY,

Appellant.

MR. JUSTICE HALE DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago in favor of plaintiff (appellee) in an action brought against defendant to recover for an alleged balance due for floor sold to plaintiff in December. The cause was submitted to a jury, which found for plaintiff, upon which verdict the judgment was entered.

The plaintiff's claim is that during the year 1929, it shipped floor to defendant upon an open account, and that the amount due to plaintiff on April 16th, 1930, was $1,767.15; that on September 3rd, 1930, a stated account was agreed to by the parties and that on that date the sum of $881.88 was paid on account; leaving a balance due of $885.30.

Defendant claims that much of the floor shipped was of an inferior quality, and that portions of it were not usable; that on September 4, 1930, after a controversy with plaintiff's agent over the quality of the floor, it was agreed between them that an allowance be made to defendant on account of the floor that was not usable and for loss in labor and materials in connection therewith, and that plaintiff agreed to and did accept the sum of $881.88, in full of all claims; that such payment was made by a check on which was endorsed on the back stamped "In full payment and satisfaction of all claims and demands to date". It is claimed by plaintiff that this check was a payment on account, and that the words "In

full payment and satisfaction of all claims and demands", appearing on the back thereof, were not on the check when plaintiff received it, but were placed thereon after the check was returned to defendant, after payment.

Henry Berger, a son of the defendant, testified that on September 2nd, 1930, Joe Fagen, a salesman for plaintiff, called upon the Bergers and requested them to settle plaintiff's claim. Berger further testified that after discussing the matter and after Fagen had called the plaintiff company by telephone and had spoken with some one, Fagen then told the witness that plaintiff would accept $891.25 in full settlement of plaintiff's claim; that the witness then gave Fagen a check for $891.25 dated Chicago, September 2, 1930, signed by I. Berger, the defendant, payable to plaintiff company; that the check at the time of its issue had endorsed on the reverse side the words, "This check is given in full payment and satisfaction of all claims and demands to date", and that the check was paid to the plaintiff company through the Chicago Clearing House September 3, 1930.

Isaac Berger, defendant, testified that he was present at the interview between his son and the agent of the plaintiff; that he heard Fagen call up the office of plaintiff, and that after talking with "them", Fagen agreed to settle for $891.25, and that he, Berger, then signed the check which was delivered to plaintiff. The giving of the check, as testified to by Berger and his son, and the agreement by Fagen, the agent of the plaintiff, to accept the check in full payment of plaintiff's account, was corroborated by Louis Kaplan, a clerk for defendant, who testified that Fagen said to Berger at the time he received the check, "Give me a check for $891.25, and that will straighten the bill you owe us in full". Fagen testified that the check for $891.25 was paid to him on account, and that defendant agreed to pay the balance and that no agreement was made to accept it in full payment.

full payment and satisfaction of all claims and demands", appearing on the back thereof, were not on the check when plaintiff received it, but were placed thereon after the check was returned to defendant, after payment.

Henry Berger, a son of the defendant, testified that in September 2nd, 1955, he began, a salesman for plaintiff, called upon the Bergers and [illegible] of the plaintiff's claim. Mayer further testified that after discussing the matter and after Pagan had called the plaintiff company by telephone and had spoken with some one, Pagan then told the witness that plaintiff would accept $25.00 in full settlement of plaintiff's claim. Then the witness gave Pagan a check for $25.00 dated Chicago, September 2, 1955, signed by E. Berger, the defendant, payable to plaintiff company; that the check at the time of its issue had endorsed on the reverse side the words, "This check is given in full payment and satisfaction of all claims and demands to date", and that the check was paid to the plaintiff company through the Chicago Clearing House September 7, 1955.

Isaac Berger, defendant, testified that he was present at the interview between his son and the agent of the plaintiff; that he heard Pagan call up the office of plaintiff, and that after talking with "them", Pagan agreed to settle for $25.00; and that he, Berger, then signed the check which was delivered to plaintiff. The giving of the check, as testified to by Berger and his son, and the agreement by Pagan, the agent of the plaintiff, to accept the check in full payment of plaintiff's account, was corroborated by Jack Lipin, a clerk for defendant, who testified that Pagan said to Berger at the time he received the check, "Give me a check for $25.00, and that will straighten the bill you owe us in full". Pagan testified that the sum for $25.00 was paid to him on account, and that defendant gave to per the balance and that no agreement was made to accept it in full payment.

Joseph Nowarka, the office manager for plaintiff company, testified that there was no endorsement on the back of the check when it was received; that he stamped the endorsement of plaintiff on it and deposited it. Hand writing experts were offered by the respective parties, one for each. As usual, the testimony of each of these witnesses supported the party retaining him. One testified that the disputed endorsement on the back of the check in question was placed there at the time the check was drawn, and the other that the endorsement was written on the check some time later. Of course, such testimony has little evidentiary or probative value.

It appears conclusively from the pleadings and from the evidence that there was a dispute between the parties prior to and on September 2, 1930, and that after a further controversy between plaintiff's agent and the Bergers, a check was given which the Bergers claim was in full, and which plaintiff claims was on account. Defendant insists that the trial court erred in refusing to admit testimony as to the condition of the flour sold by plaintiff to defendant. Before any testimony was offered, defendant's counsel stated to the court that "we expect to prove what occurred on September 2, 1930, and we have proof here to show how much of the flour was returned and proof of the flour which was destroyed because it could not be used." In the examination of defendant's son, Henry Berger, defendant's counsel asked the following question: "The flour which you received prior to April of 1930, and including the last lots, will you tell the jury the condition of the flour and the grades of the flour - if it is necessary your Honor?" To this question, counsel for defendant made the following objection, which the court sustained: "It is necessary, but I am going to object to this manner of proving it". Counsel for defendant then stated to the court: "I want to

Joseph Howard, the office manager for plaintiff company, testified that there was no endorsement on the back of the check when it was received; that he stamped the endorsement of plaintiff on it and deposited it. Hand writing experts were offered by the respective parties, one for each. As usual, the testimony of each of these witnesses supported the party retaining him. The testified that the disputed endorsement was the work of the payee in question was placed there at the time the check was drawn, and the other that the endorsement was written on the check some time later. Of course, such testimony has little evidentiary or probative value.

It appears conclusively from the pleadings and from the evidence that there was a dispute between the parties prior to and on September 5, 1950, and that after a further controversy between plaintiff's agent and the Argyre, a check was given which the Argyre claim was in full, and which plaintiff claims was on account. Defendant insists that the trial court erred in refusing to admit testimony as to the condition of the flour sold by plaintiff to defendant. Before any testimony was offered, defendant's counsel stated to the court that "we expect to prove what occurred on September 5, 1950, and we have proof here to show how much of the flour was returned and proof of the flour which was destroyed because it could not be used." In the examination of defendant's son, Henry Argyre, defendant's counsel asked the following question: "The flour which you received prior to April of 1950, and including the last lots, will you tell the jury the condition of the flour and the grades of the flour - if it is necessary your Honor?" To this question, counsel for defendant made the following objection, "the sole ground that it is immaterial, but I am going to object to this manner of proving it". Counsel for defendant then stated to the court: "I want to

show the condition of the flour, may I show what kind of flour it was?" to which the court replied: "You are not going into that yet. When it becomes competent you will get a chance to show it." No further offer of proof as to the condition of the flour was made.

We find nothing in the record in the offering or refusing of testimony, or the giving or refusing of instructions, which amounts to reversible error. The jury heard the witnesses, weighed their testimony, and found for the plaintiff. The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

35772

H. CHANNON COMPANY, a corporation,
(Plaintiff) Appellant,

v.

WHITMAN & BARNES, INC., a corporation,
(Defendant) Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

269 I.A. 649

Opinion filed Feb. 8, 1933

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for costs entered against plaintiff in the Municipal Court of Chicago in a suit by plaintiff against defendant for certain rebates or commissions alleged to be due upon purchases of goods made by plaintiff from defendant under an oral contract alleged to have been made between the parties. The cause was submitted to a jury which returned a verdict for defendant, upon which verdict this judgment was entered.

The questions here involved are whether or not the alleged contract for the payment of such rebates or commissions was made. If made, what was contemplated by the parties, and whether this court, after the jury heard the witnesses and passed upon these questions, will review the judgment.

Plaintiff is a wholesale hardware jobber and defendant a manufacturer, from whom plaintiff had been purchasing its wares. It is claimed by plaintiff that up to the year 1928, it had been receiving a five percent rebate or discount on purchases made by it from defendant company, and that in the year 1928 an agreement was entered into between the parties by the terms of which plaintiff would be allowed a ten percent rebate for the year 1929 on all purchases made, to be credited to plaintiff's account at the end of the year 1929. Defendant denies that such an agreement was made. It is the contention of defendant that the agreement made between the parties was to this effect: - Defendant had certain customers

[illegible]

M. CARNEGIE COMPANY, a corporation,
(Plaintiff) Appellant,

v.

MITCHAM & BRUNER, INC., a corporation,
(Defendant) Appellee.

Opinion filed Feb. 8, 1933

MR. JUSTICE BELL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for costs entered against plaintiff in the Municipal Court of Chicago in a suit by plaintiff against defendant for certain rebates or commissions alleged to be due upon purchases of goods made by plaintiff from defendant under an oral contract alleged to have been made between the parties. The cause was submitted to a jury which returned a verdict for defendant, upon which verdict this judgment was entered.

The questions here involved are whether or not the alleg contract for the payment of such rebates or commissions was made. If made, what was contemplated by the parties, and whether this court, after the jury heard the witnesses and passed upon these questions, will review the judgment.

Plaintiff is a wholesale hardware jobber and defendant a manufacturer, from whom plaintiff had been purchasing its wares. It is claimed by plaintiff that up to the year 1929, it had been receiving a five percent rebate or discount on purchases made by it from defendant company, and that in the year 1929 an agreement was entered into between the parties by the terms of which plaintiff would be allowed a ten percent rebate for the year 1929 on all purchases made, to be credited to plaintiff's account at the end of the year 1929. Defendant denies that such an agreement was made. It is the contention of defendant that the agreement made between the parties was to this effect: - Defendant had certain customers

in what is termed by the parties, the Chicago Territory, to whom it sold directly, which were or might be potential or possible customers of plaintiff, and that the agreement between the parties was that on the basis of all sales and shipments by defendant to these customers, an additional five percent rebate over and above the discount on sales made to plaintiff would be given to plaintiff. It is defendant's contention that all such shipments made had been accounted for and upon this latter basis, and that plaintiff had been allowed the agreed rebate, and had received credit therefor.

H. G. Elfborg, president of the plaintiff company, testified on behalf of plaintiff that in October, 1928, M. J. Kearins, the then president of defendant company, had agreed that defendant would allow plaintiff a five percent discount on all direct shipments (meaning shipments by defendant to other persons than plaintiff) and that this would amount to at least five percent of the total amount of the purchases made by plaintiff.

Frank S. Gray, a witness for plaintiff, testified that he made a demand on Kearins for an additional discount or rebate of five percent on all goods purchased by plaintiff, and was told by Kearins that defendant could not allow plaintiff such an extra discount, but would arrange for an extra allowance of five percent on direct shipments to other customers of defendant, which would equal an extra five percent on purchases made by plaintiff.

That such an agreement for an additional five percent on all purchases made by plaintiff from defendant which would amount to a discount of ten percent on all purchases made by plaintiff, was denied by Kearins, who testified that the agreement was that the extra discounts were to be paid only on goods actually shipped by defendant to customers in this Chicago territory.

The controversy between the parties is over the question as to whether the extra discount or rebate was to be a full five

in what is termed by the parties, the Chicago Territory, to whom it sold directly, which were or might be potential or possible customers of plaintiff, and that the agreement between the parties was that on the basis of all sales and shipments by defendant to these customers, an additional five percent rebate over and above the discount on sales made to plaintiff would be given to plaintiff.

It is defendant's contention that all such shipments made had been accounted for and upon this latter basis, and that plaintiff had been allowed the agreed rebate, and had received credit therefor.

H. S. Kirkbey, president of the plaintiff company, testified on behalf of plaintiff that in October, 1928, Mr. Lawlor, the then president of defendant company, had agreed that defendant would allow plaintiff a five percent discount on all direct shipments (meaning shipments by defendant to other persons than plaintiff) and that this would amount to at least five percent of the total amount of the purchases made by plaintiff.

Frank E. Gray, a witness for plaintiff, testified that he made a demand on Keating for an additional discount or rebate of five percent on all goods purchased by plaintiff, and was told by Keating that defendant could not allow plaintiff such an extra discount, but would arrange for an extra allowance of five percent on direct shipments to other customers of defendant, which would equal an extra five percent on purchases made by plaintiff.

That such an agreement for an additional five percent on all purchases made by plaintiff from defendant which would amount to a discount of ten percent on all purchases made by plaintiff, was denied by Keating, who testified that the agreement was that the extra discounts were to be paid only on goods actually shipped to defendant's customers in this Chicago territory.

The controversy between the parties is over the question as to whether the extra discount or rebate was to be a full five

percent on all goods purchased by plaintiff during the time mentioned, or an additional five percent over the discount or rebate being received by plaintiff based on the amount of direct shipments made by defendant into the Chicago territory. Plaintiff was given credit on the basis of five percent of the actual shipments by defendant into this territory.

The jury saw and heard the witnesses, and the court's rulings seem to have been eminently fair. The usual squabbles between counsel were had, but we can find nothing in the record as to the conduct of counsel, or any other matter which would justify a reversal. The judgment of the Municipal Court is affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

present on all grounds mentioned by plaintiff during the time mentioned, or an additional five percent over the discount or rebate being received by plaintiff based on the amount of direct shipments made by defendant into the Chicago territory. Plaintiff was given credit on the basis of five percent of the actual shipments by defendant into this territory.

The jury saw and heard the witnesses, and the court's rulings seem to have been eminently fair. The usual prejudice between counsel were had, but as his first ruling is the issue as to the conduct of counsel, or any other matter which would justify a reversal. The judgment of the municipal Court is affirmed.

AFFIRMED.

Hebel, P.J., and Burke, J., concur.

36284

RICHARD BOWBAL, a minor, by ANTON BOWBAL, his father and next friend,
Appellee,

vs.

JOHN POZNIAK, a minor, and MICHAEL JUREK,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

269 I.A. 648

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, by his father and next friend, brought suit against the defendants to recover damages for personal injuries. There was a jury trial and a verdict and judgment in plaintiff's favor for $900 and the defendants appeal.

The record discloses that about 7:30 o'clock in the evening of June 18, 1930, plaintiff, a boy about five years of age, was either walking or running east on the south sidewalk of West 40th place, Chicago, and collided with a Ford truck which was being driven north in the alley by the defendant, John Pozniak, stepson of the other defendant, Michael Jurek.

Plaintiff's theory was, and the evidence offered in his behalf tended to show, that he and other children were playing in West 40th place; that plaintiff was walking east on the sidewalk and when he stepped into the north and south alley a Ford truck driven by the defendant Pozniak came out of the al ey from the south and the left front fender struck plaintiff, throwing him down, and the left hind wheel ran over one of plaintiff's feet; that the truck did not stop and the horn was not sounded as the truck came out of the alley.

On the other hand, the two defendants and another man who was riding in a truck driven by the defendant Jurek just behind the truck which struck plaintiff, all testified that they saw plaintiff before he reached the alley and that he ran east near the

south edge of the sidewalk and into the side of the truck and fell down, and that the truck stopped almost immediately. If the jury found that the accident occurred as testified to by these three witnesses there would probably be no liability; but there was a conflict in the evidence and the question was one for the jury. Upon a careful consideration of all the evidence we are unable to say that the finding of the jury in favor of the plaintiff is against the manifest weight of the evidence. In these circumstances we would not be warranted in disturbing the judgment on the ground that there was no evidence to warrant the verdict or that it was against the manifest weight of the evidence. Plaintiff being but five years of age was incapable of being negligent. Raskaliunas v. C. & W. I. R. R. Co., 318 Ill. 142.

A further point is made by the defendants that the verdict cannot stand because there was a count charging willful and wanton negligence and other counts charging ordinary negligence, and that there was no evidence of any willful or wanton conduct. We have held contrary to defendants' contention in Price v. Bailey, 265 Ill. App. 358. However, the question is not involved in this case because the count which it is claimed charged willful and wanton conduct, was withdrawn by plaintiff before the case went to the jury.

The defendants further contend that the court erred in giving an instruction, at the request of plaintiff, by which the jury were told that if they believed from the evidence and under the instructions of the court, that plaintiff had proven the allegations contained in one or more counts of the declaration by a preponderance of the evidence, and if they further believed from the evidence that plaintiff was injured through the negligence of the defendants as charged in such count, their verdict should be for the plaintiff. It is argued that this instruction directed a verdict and that it was erroneous because several counts of the declaration did not

upon each of the elements set forth on the face of the issue and that, and that the trial judge charge accordingly. If the jury found that the accident happened as claimed by the owner therein, it would properly be instructed to find for the defendant. Upon a careful consideration of all the evidence and the question was for the jury, we would not be warranted in disturbing the judgment on the ground that there was no evidence to warrant the verdict or that if was against the manifest weight of the evidence. Affirmed. Judgment. Fifty years of age was insufficient of being negligent. Hendricksen v. C. B. & Q. R. R. Co., 319 Ill. 324.

A further point is made by the defendants that the trial court failed because that a crash occurred, willful and wanton negligence and other counts charging ordinary negligence, and that there was no evidence of any willful or wanton conduct. In this Ill. Ill. contrary to defendants' contention in Pyle v. Pyle, 348 Ill. App. 320. However, the question is not involved in this case because the court which it is claimed charged willful and wanton conduct, was withdrawn by plaintiff before the case went to the jury. The defendants further contend that the court erred in giving an instruction, at the request of plaintiff, by which the jury were told that if they believed from the evidence and under the instructions of the court, that plaintiff had proved the allegations contained in one or more counts of the instruction by a preponderance of the evidence, and if they further believed from the evidence that plaintiff was injured through the negligence of the defendants as charged in such count, their verdict should be for the plaintiff. It is argued that this instruction invested a verdict and that it was not withdrawn because counsel of the defendants did not

state a cause of action; that in one of the counts an ordinance of the City of Chicago was set up which required a person driving a motor vehicle, when emerging from an alley, to sound a horn and to stop before driving across the sidewalk; that this ordinance was introduced in evidence and afterward stricken out by the court on motion of counsel for the defendants and the jury instructed to disregard it. And the argument seems to be that since the ordinance was stricken out there was no necessity for sounding the horn or stopping the truck before crossing the sidewalk. We think this contention is unsound. The evidence to the effect that defendant did not sound the horn or stop the truck before coming out of the alley across the sidewalk might properly be considered by the jury in determining whether there was negligence on the part of the defendants in the absence of any ordinance.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

state a cause of action; that in one of the courts on criminal of the city of Chicago was set up which required a person driving a motor vehicle, when emerging from an alley, to sound a horn and to stop before driving across the sidewalk; that this ordinance was influenced in evidence and expressed statutory and by the court to matter of counsel for the defendants and the jury instructed to disregard it. And the argument seems to be that since the ordinance was stricken out issue was so essentially its consideration the horn or stopping the truck before crossing the sidewalk. We think this contention is unsound. The evidence in the effect that defendants did not sound the horn or stop the truck before coming out of the alley across the sidewalk might strongly be considered by the jury in determining whether there was negligence on the part of the defendants in the absence of any ordinance.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Lawrence, P. J., and Scanlan, J., concur.

35836

JACOB L. RIGSMAN,

(Plaintiff) Plaintiff in Error,

v.

JACOB GIDWITZ,

(Defendant) Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Feb. 8, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is a writ of error to reverse a judgment for costs against the plaintiff entered by the Municipal Court of Chicago on a verdict of a jury finding the issues against the plaintiff. Plaintiff's action is based upon an alleged agreement of the defendant to hold him, the plaintiff, harmless from any loss on account of the signing of a certain note by the plaintiff which was made payable to and held by the Community State Bank. It is the contention of the defendant that he did not agree to indemnify or hold harmless the plaintiff, as charged, and that in fact the note in question was not subsequently paid by the plaintiff.

From the facts it appears that sometime in 1931, one Wechsler was president and Jacob Gidwitz was the vice-president and cashier of the Community State Bank of Chicago; that the bank was interested in promoting the sale of certain stock of the Grossfeld & Roe Company and had disposed of 50 shares of the stock to one Greenwald for the sum of $5,000 and had accepted his note with a credit of $1,000 paid on the purchase.

According to the testimony of Rissman, the plaintiff, he had a talk with Wechsler and Gidwitz and was told about the deal and informed that as they were officers of the bank it was impossible for them to discount the note through their own account and asked him, the plaintiff, to endorse the note; that they stated

JACOB I. ALSMAN,	)	Error to
(Plaintiff) Plaintiff in Error,	)	Municipal Court
v.	)	
JACOB SIGVITZ,	)	of Chicago.
(Defendant) Defendant in Error.	)	

Opinion filed Feb. 8, 1933

Mr. Presiding Justice Matchett delivered the opinion of the court.

This is a writ of error to reverse a judgment for costs against the plaintiff entered by the Municipal Court of Chicago on a verdict of a jury finding the issues against the plaintiff. Plaintiff's action is based upon an alleged agreement of the defendant to hold him, the plaintiff, harmless from any loss on account of the signing of a certain note by the plaintiff which was made payable to and held by the Community State Bank. It is the contention of the defendant that he did not agree to indemnify or hold harmless the plaintiff, as charged, and that in fact the note in question was not subsequently paid by the plaintiff.

From the facts it appears that sometime in 1931, one Woehler was president and Jacob Sidwitz was the vice-president and cashier of the Community State Bank of Chicago; that the bank was interested in promoting the sale of certain stock of the Greenfield & Roe Company and had disposed of [illegible] shares of the stock to one Greenwald for the sum of $3,000 and had accepted his note with a credit of $1,000 paid on the purchase.

According to the testimony of Alsman, the plaintiff, he had a talk with Woehler and Sidwitz and was told about the deal and informed that as they were officers of the bank it was impossible for them to discount the note through their own account and asked him, the plaintiff, to endorse the note; that they stated

to him, Rissman, that there was collateral against the note and they would hold him, the plaintiff, harmless; that the stock referred to was the stock of Grossfeld & Roe.

Later one Shulman became president of the bank, sometime in 1921, and the plaintiff was informed by Shulman that the note was due and that he would be required to sign a new note. Plaintiff testified that Gidwitz was present at this meeting and again agreed to hold him harmless against the new note in the event he would agree to make out and sign it. Plaintiff on February 1, 1922, made and executed the note in question for the sum of $5,073.91, which showed on its face that it was secured by collateral consisting of 50 shares of Grossfeld & Roe stock No. 99, issued to J. Greenwald.

The testimony is vague and uncertain as to what became of the old note signed by Greenwald after the making and execution of this new note of February 1, 1922. The original statement of claim in this action was based upon the original note signed by Greenwald, together with an alleged renewal thereof. It charges that the plaintiff, at the special instance and request of the defendants Gidwitz and Wechsler, endorsed a note for Greenwald for the sum of $4,000, at which time the defendants agreed to hold him, the plaintiff, harmless. This original statement of claim was filed sometime in June, 1927. Upon the trial of this cause it was apparent that the original note had been supplanted by the new note signed by Rissman and that the original transaction or agreement, if any, at which time the note of February 1, 1922, was made and executed, was supplanted by the new transaction. Moreover, it is apparent that Wechsler was not present at the time this new note was given, consequently, this action failed as to him. During the trial, sometime about the middle of 1930, the court permitted plaintiff to file an amended statement of claim setting up the new note based upon the

to him, Hiemann, that there was collateral against the note and they would hold him, the plaintiff, harmless; that the stock referred to was the stock of Crescentia & Sue.

Later one Thulman became president of the bank, sometime in 1921, and the plaintiff was informed by Thulman that the note was due and that he would be required to sign a new note. Plaintiff testified that Ridgate was present at this meeting and again agreed to hold him harmless against the new note in the event he would agree to make out and sign it. Plaintiff on February 1, 1921, made and executed the note in question for the sum of $3,[illegible], which showed on its face that it was secured by collateral consisting of 50 shares of Crescentia & Sue stock No. 90, issued to H. Hiemann.

The testimony is vague and uncertain as to what became of the old note signed by Crescentia after the making and execution of this new note of February 1, 1921. The original statement of claim in this action was based upon the original note signed by Hiemann, together with an illegal transfer thereof. It appears that the plaintiff, at the special instance and request of the defendants Didrix and Modster, endorsed a note for Crescentia for the sum of $4,000, at which time the defendants agreed to hold him, the plaintiff, harmless. This original statement of claim was filed sometime in June, 1921. Upon the trial of this cause it was conceded that the original note had been supplanted by the new note signed by Hiemann and that the original transaction or agreement, if any, at which time the note of February 1, 1921, was made and executed, was supplanted by the new transaction. Moreover, it is apparent that Modster was not present at the time this new note was given, consequently, this action failed as to him. During the trial, sometime about the middle of 1921, the court permitted plaintiff to file an amended statement of claim setting up the new note based upon the

allegation that this new note had been guaranteed by the defendant Gidwitz. This, in fact, amounted to a new cause of action, but the question was not raised and the cause proceeded, the affidavit of defense of the defendant Gidwitz being allowed to stand as the answer to the new statement of claim.

From the chronological order of events it would appear that the action upon which the plaintiff sought to recover was commenced nearly ten years after the cause of action accrued. It appears from the evidence that the giving of the second note was at the instance and request of Shulman, the new president of the Community Bank. Plaintiff testified that Gidwitz was present and again agreed to hold the plaintiff harmless and this was denied by the defendant.

Great stress is laid upon the fact that the trial court asked numerous questions in regard to the transaction and thereby tended to prejudice the jury, but the fact is that the matter was so involved that it became necessary for the court to ask the questions which were pertinent, in order to ascertain the facts.

November 4, 1921, Rissman filed suit in the Circuit Court, as owner of the Greenwald note, and obtained a judgment by confession against the maker Joseph Greenwald. At this time he was represented by a firm of lawyers of whom Shulman, president of the bank, was a member. This judgment was set aside on the motion of the defendant Greenwald on the ground that Rissman was not an innocent holder, but a party to a fraud in seeking to establish liability against the defendant. In November 1921 the judgment was vacated. In July 1925, the Community State Bank brought suit against Rissman on the note of February 1, 1922 and obtained a judgment in full and for costs. There is nothing in the record to indicate that Rissman notified either Gidwitz or Wechsler that he would hold them

allegation that this new note had been guaranteed by the defendant dishwin. This, in fact, amounted to a new cause of action, but the question was not raised and the cause proceeded. The affidavit of defence of the defendant dishwin being allowed to stand as the answer to the new statement of claim.

From the chronological order of events it would appear that the action upon which the plaintiff sought to recover was commenced nearly ten years after the cause of action accrued. It appears from the evidence that the giving of the second note was at the instance and request of Shulman, the new president of the Community Bank. Plaintiff testified that dishwin was present and again agreed to hold the plaintiff harmless and this was denied by the defendant.

Great stress is laid upon the fact that the trial court asked numerous questions in regard to the transaction and thereby tended to prejudice the jury, but the fact is that the matter was so involved that it became necessary for the court to ask the questions which were pertinent, in order to ascertain the facts.

November 4, 1921, Clemens filed suit in the District Court, as owner of the unpaid note, and obtained a judgment by confession against the maker Joseph Greenwald. At this time he was represented by a firm of lawyers of whom Shulman, president of the bank, was a member. This judgment was set aside on the motion of the defendant Greenwald on the ground that Clemens was not an innocent holder, but a party to a fraud in seeking to establish liability against the defendant. In November 1922 the judgment was vacated. In July 1928, the Community State Bank brought suit against Clemens on the note of February 1, 1922 and obtained a judgment in full and for costs. There is nothing in the record to indicate that Clemens notified either dishwin or Greenwald that he would hold them

responsible for any judgment obtained by the bank, although it does appear in the record that Gidwitz testified as a witness in the cause.

Upon the trial of the action now before us Shulman produced certain documents, being Exhibits Nos. 1 to 7, consisting of certain communications signed by Gidwitz directing the bank to hold as collateral for J. L. Rissman 50 shares of Grossfeld & Roe stock and a further communication directing the substitution of certain other shares of stock in lieu of the Grossfeld & Roe Company's stock. The only explanation by Shulman was that he found these documents among the files of the bank, but that he, Shulman had no information as to what they pertained other than shown on the face of the documents. Upon objection of the defendant, the court refused to admit these documents in evidence. This action of the court is claimed to be reversible error. Rissman testified that Gidwitz had stated that the Grossfeld & Roe Company's stock was up to protect the original note and the defendant also stated that the Grossfeld & Roe Company's stock was up as collateral and that it belonged to him. Gidwitz further stated that he was the owner of the stock of the Osborne Oil Company and that he placed the 50 shares of the General Paint & Varnish Company stock referred to in the documents as collateral for the note in lieu of the Grossfeld & Roe stock which he had taken down; that this was done with the consent and knowledge of the bank. This question not being disputed, but admitted by the defendant, the refusal of the trial court to admit the documents in evidence was harmless error as it could have added nothing to the testimony of the defendant and that of the plaintiff.

Objection was made to the action of the court in admitting in evidence certain documents of the bank in which the

responsible for any judgment obtained by the bank, although it does appear in the record that Gibbs testified as a witness in the cause.

Upon the trial of the action now before us Bluhm, pursuant certain documents, being exhibits nos. 1 to 7, consisting of certain communications signed by Gibbs directing the bank to hold as collateral for L. L. Bluhm 50 shares of Crosafold & Co stock and a further communication directing the substitution of certain other shares of stock in lieu of the Crosafold & Co Company's stock. The only explanation by Bluhm was that he found these documents among the files of the bank, but that he, Bluhm had no information as to what they contained other than shown on the face of the documents. Upon objection of the defendant, the court refused to admit these documents in evidence. This action of the court is claimed to be reversible error. Bluhm testified that Gibbs had stated that the Crosafold & Co Company's stock was up to protect the original note and the defendant also stated that the Crosafold & Co Company's stock was up as collateral and that it belonged to him. Gibbs further stated that he was the owner of the stock of the Dakota Oil Company and that he signed the 50 shares of the General Paint & Varnish Company which referred to in the documents as collateral for the note in lieu of the Crosafold & Co stock which he had taken down; that this was done with the consent and knowledge of the bank. This question not being disputed, but admitted by the defendant, the refusal of the trial court to admit the documents in evidence was harmless error as it could have added nothing to the testimony of the defendant and that of the plaintiff.

Objection was made to the action of the court in admitting in evidence certain documents of the bank in which the

plaintiff kept his account, showing that on the day upon which plaintiff satisfied the judgment against him in the Municipal Court on the note involved here, he had deposited the exact amount necessary to satisfy the judgment. One of the theories of the defense was that the judgment was not in fact paid by the plaintiff Bissman, but by the Community Bank or somebody on its behalf in order to acquire a right of action against the defendant in the proceeding now before us. It appeared from the records of the bank that it had received two notes totaling $6,441.28, executed by a Mr. Beltner and a Mr. Price and credited to the Bissman account. These notes do not appear to have been paid. It is contended they never were intended to be paid. That plaintiff, therefore, never had a balance sufficient to cover his check given in satisfaction of the judgment. The plaintiff's recollection as to how the note in suit was paid was uncertain and vague. The defendant was entitled to introduce evidence in support of his theory of the defense that the note in fact had not been paid, and the evidence obtained in the records of the bank was competent for that purpose.

The question was one of fact for the jury. The demand was old and the evidence necessary to establish an undertaking on the part of the defendant to hold the plaintiff harmless was not of such a character as the law requires. The burden was upon the plaintiff to establish the fact and the question was properly submitted to the jury.

We see no reason for disturbing the judgment of the Municipal Court and for that reason the judgment is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

plaintiff kept his account, showing that on the day upon which plaintiff notified the judgment against him in the municipal court on the note involved here, he had deposited the exact amount necessary to satisfy the judgment. One of the theories of the defense was that the judgment was not in fact paid by the plaintiff himself, but by the Community Bank or somebody on its behalf in order to acquire a right of action against the defendant in the proceeding now before us. It appeared from the records of the bank that it had received two notes totaling $6,411.36, executed by a Mr. Dalhart and a Mr. Price and credited to the Hibson account. These notes do not appear to have been paid. It is contended they never were intended to be paid. That plaintiff, therefore, never had a balance sufficient to cover his check given in satisfaction of the judgment. The plaintiff's recollection as to how the note in suit was paid was uncertain and vague. The defendant was entitle to introduce evidence in support of his theory of the defense that the note in fact had not been paid, and the evidence obtained in the records of the bank was competent for that purpose.

The question was one of fact for the jury. The issue was old and the evidence necessary to establish an understanding on the part of the defendant to hold the plaintiff harmless was not of such a character as the law requires. The jurors are given the plaintiff to establish the fact and the question was properly submitted to the jury.

We see no reason for disturbing the judgment of the municipal court and for that reason the judgment is affirmed.

JUDGMENT AFFIRMED.

Brown, J.; Hall, J., concur.

35946

JOHN J. MINOGUE, Appellee, v. FRANK ZOLPUS, Appellant.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

269 I.A. 648[3]

Opinion filed Feb. 8, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought his action in the Municipal Court to recover for damages sustained to his automobile by reason of the negligence of the defendant.

From the facts it appears that plaintiff's automobile was parked in front of his home at 5742 South Loomis boulevard. The defendant was driving an automobile north on Loomis boulevard and struck the car of the plaintiff. There is evidence that the defendant at the time was intoxicated and from the facts there is ample evidence to sustain the finding of the trial judge and the judgment entered on the finding in favor of the plaintiff for the sum of $313.00.

Upon the trial the plaintiff introduced in evidence the testimony of the man who made the repairs, together with the repair bill which had been paid by the plaintiff. The repairman testified that the work done was necessary and that the charges were fair, reasonable and customary. There is no evidence in contradiction as to the amount of the damages. Under the rulings of this court the introduction of the testimony of the repairman, together with the bill and the payment of the same, was sufficient. Moyer v. Vaughan' Seed Store, 248 Ill. App.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion Filed Feb. 8, 1921.

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT:

Plaintiff brought his action in the municipal court to recover for damages sustained to his automobile by reason of the negligence of the defendant.

From the facts it appears that plaintiff's automobile was parked in front of his home at 5942 South Loomis boulevard. The defendant was driving an automobile north on Loomis boulevard and struck the car of the plaintiff. There is evidence that the defendant at the time was intoxicated and from the facts there is ample evidence to sustain the finding of the trial judge and the judgment entered on the finding in favor of the plaintiff for the sum of $215.00.

Upon the trial the plaintiff introduced in evidence the testimony of the man who made the repairs, together with the repair bill which had been paid by the plaintiff. The repairman testified that the work done was necessary and that the charges were fair, reasonable and customary. There is no evidence in contradiction as to the amount of the damages. Under the rulings of this court the introduction of the testimony of the repairman, together with the bill and the payment of the same, was sufficient. Moore v. Thompson, 208 Ill. App.

308. The decision in Probasco v. Crane Company, 338 Ill. App. 357, relied upon by the defendant, is no longer the rule.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

MEHEL AND HALL, JJ. CONCUR.

36035

JOHN WOLD,

Plaintiff - Appellee,

v.

JAMES SLAGEL and PHILIP LARAMIE, Co-partners, doing business as DIXIE HIGH-GRADE LAUNDRY, and JACK LEITER,

Defendants - Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

52

4

269 I.A. 648

Opinion filed Feb. 8, 1933

MR. PRESIDING JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff, John Wold, recovered a judgment in the Superior Court against the defendants, James Slagel and Philip Laramie, co-partners, doing business as Dixie High-Grade Laundry, and Jack Leiter, an individual, for injuries sustained by reason of an accident at the corner of 53rd street and Kenwoth avenue, two intersecting streets in the city of Chicago. The declaration consisted of eight counts and the 3rd, 4th, 6th and 7th of these counts were withdrawn on motion of plaintiff.

The first count charged that the plaintiff, while in the exercise of ordinary care for his own safety, and while traveling along a certain highway in the city of Chicago, known as 53rd street, was struck by a certain automobile operated by the defendant Leiter, who, at the time, was employed by Slagel and Laramie doing business as Dixie High-Grade Laundry; charges that this automobile was operated in a careless and negligent manner and by reason thereof plaintiff was struck and injured.

The second count charges negligence in that the defendants failed to give any warning of the approach of the truck.

The fifth count charges excessive speed, contrary to the statute.

The eighth count charges willful and wanton negligence.

From the facts it appears that the plaintiff had

JOHN VOLK,

Plaintiff - Appellee,

v.

JAMES BLAGGI and PHILIP LAMANNA,
Co-partners, doing business as
DIXIE HIGH-GRADE LAUNDRY, and
JACK LEITER,

Defendants - Appellants.

Opinion filed Feb. 8, 1933

MR. PRESIDING JUSTICE ELBRON DELIVERED THE OPINION OF THE COURT:

Plaintiff, John Volk, recovered a judgment in the Superior Court against the defendants, James Blaggi and Philip Lamanna, co-partners, doing business as Dixie High-Grade Laundry, and Jack Leiter, an individual, for injuries sustained by reason of an accident at the corner of 53rd street and Cottage Grove avenue, the intersecting streets in the city of Chicago. The declaration consisted of eight counts and the 3rd, 4th, 5th and 7th of these counts were withdrawn on motion of plaintiff.

The first count charges that the plaintiff, while in the exercise of ordinary care for his own safety, and while travelling along a certain highway in the city of Chicago, known as 53rd street, was struck by a certain automobile operated by the defendant Leiter, who, at the time, was employed by Blaggi and Lamanna doing business as Dixie High-Grade Laundry; charges that this automobile was operated in a careless and negligent manner and by reason thereof plaintiff was struck and injured.

The second count charges negligence in that the defendants failed to give any warning of the approach of the truck.

The fifth count charges excessive speed, averring in the statute.

The eighth count charges willful and wanton negligence.

From the facts it appears that the plaintiff had

reached the southwest corner of Wentworth and 53rd street about 6;30 o'clock in the morning; that it was dark and foggy; that as he reached the corner he saw a street car standing at the southeast corner headed north; that he intended to take the car and stepped out on Wentworth avenue for the purpose of crossing over to board the car; that his eyesight and hearing were good; that as he started forward he saw a truck about a half block or possibly 200 feet away moving toward the south; that after he saw the truck he continued toward the street car and was within two or three steps of the street car tracks when he was struck by the truck. Several witnesses testified that the truck was going not less than 35 miles an hour and that it ran a considerable distance past the plaintiff after the accident.

Leiter, one of the defendants and driver of the truck, testified that as he approached 53rd street from the north he slowed down to about 5 miles an hour and that prior to that time he had not been driving faster than 15 or 20 miles an hour; that as he came to the corner he noticed a man running toward Wentworth avenue and as the truck proceeded across the intersection at a rate of speed of about 8 to 10 miles an hour he blew his horn; that when he saw the man crossing ahead of him he started to swing his truck to the east to avoid striking him.

Upon the trial a special interrogatory was handed to the jury covering the question of willful and wanton negligence and this interrogatory was answered in the affirmative.

A number of reasons are advanced by counsel for defendants as to why the judgment should be reversed. Among these it is insisted that the judgment is a joint judgment and that the liability of Slagel and Laramie arises out of the relationship existing between them and the defendant Leiter. In other words, where the liability of the master is dependent upon the negligence of its servant or agent,

reached the southwest corner of Wentworth and 82nd street about 8:30 o'clock in the morning; that it was dark and foggy; that as he reached the corner he saw a street car standing at the southeast corner headed north; that he intended to take the car and stepped out on Wentworth avenue for the purpose of crossing over to board the car; that his eyesight and hearing were good; that as he stepped forward he saw a truck about a half block or possibly 300 feet away moving toward the south; that after he saw the truck he continued toward the street car and was within two or three steps of the street car tracks when he was struck by the truck. Several witnesses testified that the truck was going not less than 35 miles an hour and that it ran a considerable distance past the plaintiff after the accident.

Later, one of the defendants and driver of the truck, testified that as he approached 82nd street from the north he slowed down to about 5 miles an hour and that prior to that time he had not been driving faster than 15 or 20 miles an hour; that as he came to the corner he noticed a car coming toward Wentworth avenue and as the truck proceeded across the intersection at a rate of speed of about 8 to 10 miles an hour he blew his horn; that when he saw the man crossing ahead of him he started to swing his truck to the east to avoid striking him.

Upon the trial a special interrogatory was handed to the jury covering the question of willful and wanton negligence and this interrogatory was answered in the affirmative.

A number of reasons are advanced by counsel for defendant as to why the judgment should be reversed. Among these it is insisted that the judgment is a joint judgment and that the liability of Siegel and Larmie arises out of the relationship existing between them and the defendant Reiter. In other words, where the liability of the master is dependent upon the negligence of his servant or age

the master is liable only because of the rule of respondeat superior. Considerable confusion existed in this state as to the right to recover against the master and servant in a joint action where the liability of the master is predicated upon the rule of respondeat superior. The Supreme court of this state, however, in the case of Skala v. Lehon, 343 Ill. 602, (not cited by counsel) has settled this question and has adopted the rule that a joint action may be maintained against the master and his servant where the master's liability is founded on the doctrine of respondeat superior.

A more serious objection, however, is to the giving of instructions 2 and 3. Instruction number 2 told the jury that if the accident happened "at a point where persons were liable and went to be, and the driver of defendants' automobile at the time and place in question had knowledge of that fact, * * ** and failed to exercise ordinary care, then you should find the defendant guilty. There is in the record certain testimony to the effect that there was a vacant lot on the corner and a store on a 25 foot lot near the corner, but there is little, if any, direct evidence as to the character of the neighborhood and whether people were liable to congregate at that particular point. Neither is there any evidence that at the time, 6:30 O'clock in the morning of December 15th, there were such a number of persons as would justify the giving of this instruction.

Instruction number 3 has been repeatedly condemned and held to be reversible error. This instruction was, in the language of the statute, known as the Motor Vehicle Act. By this instruction the jury was told that if the motor vehicle was operated along any public highway in the state where it passed through a closely built up business portion of any incorporated village or town at a rate of speed in excess of 10 miles an hour, or in any residential portion of any incorporated city, town or village in excess of 15 miles an

the master is liable only because of the rule of respondeat superior considerable confusion existed in this state as to the right to recover against the master and servant in a joint action where the liability of the master is predicated upon the rule of respondeat superior. The supreme court of this state, however, in the case of Wells v. Lemon, 345 Ill. 603, (not cited by counsel) has settled this question and has adopted the rule that a joint action may be maintained against the master and his servant where the master's liability is founded on the doctrine of respondeat superior.

A more serious objection, however, is to the giving of instructions 2 and 3. Instruction number 2 told the jury that if the accident happened "at a point where persons were liable and went to be, and the driver of defendants' automobile at the time and place in question had knowledge of that fact, " " " and failed to exercise ordinary care, then you should find the defendant guilty." There is in the record certain testimony to the effect that there was a vacant lot on the corner and a store on a 25 foot lot near the corner, but there is little, if any, direct evidence as to the character of the neighborhood and whether people were liable to congregate at that particular point. Neither is there any evidence that at the time, 6:30 o'clock in the morning of December 12th, there were such a number of persons as would justify the giving of this instruction.

Instruction number 3 has been repeatedly condemned and held to be reversible error. This instruction was, in the language of the statute, known as the Motor Vehicle Act. By this instruction the jury was told that if the motor vehicle was operated along any public highway in the state where it passed through a closely built up business portion of any incorporated village or town at a rate of speed in excess of 10 miles an hour, or in any residential portion of any incorporated city, town or village in excess of 15 miles an

hour, that such rates of speed should be deemed prima facie evidence that the person operating such motor vehicle was running at a rate of speed greater than was reasonable and proper.

There was a conflict in the testimony between the witnesses for the plaintiff and defendants as to the rate of speed at which the truck was running. The rule as to what constitutes prima facie evidence as found in this state is a rule of law for the guidance of the court and not a rule of evidence for the jury. The giving of this identical instruction was held reversible error in the case of Stansfield v. Wood, 231 Ill. App. 586. To the same effect see Riddle v. Manager, 264 Ill. App. 68; Stamas v. Naakow, 250 Ill. App. 364; Barnhart v. Goin, 266 Ill. App. 591. In the case last cited the court in its opinion, said:

> "In this case we can see how the question of speed might have been one of compelling force with the jury and with the record in the condition it is, containing wilful and wanton counts in the declaration, we believe it was necessary to have the jury accurately instructed and that the errors are sufficient for a reversal of the case."

The instruction which was given in the case just cited was in the language of the statute in regard to the speed of the automobile and directly in point.

A number of other questions involving the admissibility of evidence are raised, but it is unnecessary to consider them in view of the error in the trial caused by the giving of instructions 2 and 3 on behalf of the plaintiff.

For the reasons stated in this opinion the judgment of the Superior Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBLE AND HALL, JJ. CONCUR.

Hence, that such rules of speed should be based upon logic evidence that the person operating such motor vehicle was running at a rate of speed greater than was reasonable and proper.

There was a conflict in the testimony between the witnesses for the plaintiff and defendants as to the rate of speed at which the truck was running. The rule as to what constitutes prima facie evidence as found in this state is a rule of law for the guidance of the court and not a rule of evidence for the jury. The giving of this limited instruction was held reversible error in the case of Springfield v. Wood, 283 Ill. App. 388. To the same effect see Dalia v. Hunsacker, 264 Ill. App. 69; Hanna v. Yunker, 280 Ill. App. 261; Schwartz v. Dale, 266 Ill. App. 321. In the case last cited the court in its opinion, said:

> "In this case we can see nor the question of speed might have been one of compelling force with the jury and with the record in the condition it is, certainly which and wanton conduct in the defendants, we believe it was necessary to have the jury adequately instructed and that the errors are sufficient for a reversal of the case."

The instruction which was given in the case just cited was in the language of the statute in regard to the speed of the automobile and directly in point.

A number of other questions involving the admissibility of evidence are raised, but it is unnecessary to consider them in view of the error in the trial caused by the giving of instructions 2 and 3 on behalf of the plaintiff.

For the reasons stated in this opinion the judgment of the Superior Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

KNOX AND HAIG, JJ., concur.

36278

THOMAS J. POWERS, Administrator of Estate of MARIE POWERS, Deceased,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY et al.,
Appellants.

44 A

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

269 I.A. 647

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This case was before this court on a former appeal (259 Ill. App. 648), where a judgment entered in favor of defendants on a verdict of a jury as instructed by the court was reversed and the cause remanded for trial.

The sole question there considered was whether there was evidence from which the jury could reasonably have found that plaintiff's intestate was in the exercise of due care at the time she received the injuries from which she died. This court held that there was such evidence. Upon the second trial the jury has returned a verdict in favor of plaintiff and assessed the damages at $5,000, upon which the court, overruling motions for a new trial and in arrest entered judgment.

The evidence shows that plaintiff's intestate died as the result of injuries which she sustained about seven o'clock on the evening of January 10, 1927, at or near the intersection of Ashland avenue and 65th street, Chicago. The deceased was 23 years of age, worked at a downtown store and at the time of the accident which resulted in her death was on her way to the home of her father with whom she lived.

Ashland avenue runs north and south; 65th street, east and west, and 65th street is at the place in question 40 feet wide. Two tracks of the defendant railways run parallel to each other in Ashland avenue; southbound cars ran over the west track and north-

STATE

vs.

Estate of Maria Young, Deceased,
Appellee.

vs.

DENVER CITY RAILWAY COMPANY et al.,
Appellants.

MR. JUSTICE ALSCHULER DELIVERED THE OPINION OF THE COURT:

This case was before this court on a former appeal (Ill. App. 418), where a judgment entered in favor of defendants on a verdict of a jury as instructed by the court was reversed and the cause remanded for trial.

The main question there questioned was whether there was evidence from which the jury could reasonably have found that plaintiff's intestate was in the exercise of due care at the time he received the injuries from which he died. This court held that there was such evidence. Upon the second trial, the jury had returned a verdict in favor of plaintiff and assessed the damages at $4,000, upon which the court, overruling motions for a new trial and in arrest entered judgment.

The evidence shows that plaintiff's intestate died as the result of injuries which are mentioned above, seven o'clock on the evening of January 10, 1907, at or near the intersection of Lincoln avenue and 47th street, Chicago. The terminal was 12 feet of ground located in Lot 1 which was on her way to the home of her father-in-law, who lived.

Lincoln avenue runs north and south; 47th street, east and west, and 47th street is at the place in question at its wide. The tracks of the defendant railroad run parallel to each other in Lincoln avenue; southbound cars run over the west track and northbound

bound cars over the east track.

The streets at this particular time were wet with a little snow. The northeast corner of the intersection was vacant. The first building north of the intersection and on the east side of Ashland avenue was an undertaking parlor located 150 feet north of the north crosswalk. On the northwest corner of the intersection was an oil station.

On her homeward journey the deceased apparently alighted from a southbound car, whether from the front or rear does not appear from the evidence, since no witness saw her alight. She started to walk in an easterly direction toward her home; whether practically on the north crosswalk of 68th street or some distance north of it is one of the matters in dispute. As she moved east and while on the east track she was struck by a northbound car and her body carried by it to a point opposite the undertaking establishment.

The case went to the jury under a single count which charged general negligence of defendants in the operation and control of the street car. There was a wilful and wanton count which was instructed out of the case at the close of the evidence for plaintiff.

There was evidence from which the jury might have reasonably found that the northbound car was proceeding across the intersection at a speed from 25 to 30 miles an hour, and there was also evidence from which the jury might reasonably have found that the motorman operating defendants' car was not on the lookout as he should have been while crossing this intersection.

The evidence of the motorman, however, was to the effect that the deceased came upon the northbound track suddenly and from behind a large truck which was then moving southward across the intersection and which prevented him from seeing her in time to stop his car and prevent the accident. He estimated the speed of his car

bound case over the east track.

The drivers at this particular time were not with a little more. The motorman owner of the intersection was vacant. The first building north of the intersection and on the east side of Amherst avenue was a mortgaging permit issued 180 feet north of the north crossing. In the northbound corner of the intersection was an oil station.

On her homeward journey the deceased unfortunately alighted from a northbound car, whether from the front or rear does not appear from the evidence, since no witness saw her alight. She started to walk in an easterly direction toward her home; whether practically on the north crossing of 65th street or some distance north of it is one of the matters in dispute. As she moved east and while on the east track was struck by a northbound car and her body carried by it to a point opposite the underlying petitioner.

The case went to the jury under a single count which charged general negligence of defendants in the operation and control of the street car. There was a willful and wanton count which was dismissed at the close of the evidence for plaintiff.

There was evidence from which the jury might have reasonably found that the northbound car was approaching across the intersection at a speed from 25 to 30 miles an hour, and there was also evidence from which the jury might reasonably have found that the motorman operating defendants' car was not on the lookout as he should have been while crossing this intersection.

The evidence of the motorman, however, was to the effect that the deceased came upon the northbound track suddenly and from behind a large truck which was then moving southward across the intersection and which prevented him from seeing her in time to stop his car and prevent the accident. He estimated the speed of this car

to be ten to twelve miles an hour. His evidence in this respect is corroborated by two witnesses who say that they were riding on the front platform on a southbound car north of the intersection. They say that two street cars preceded them and that these cars were followed by the truck. These witnesses also say that the accident occurred from 50 to 100 feet north of the north curb of 65th street.

On the other hand, McKeag, a witness for plaintiff, who at the time of the accident was standing on the northeast corner of 65th street and Ashland avenue, says that the deceased came from behind a car that was going south; that she turned her head both north and south and then proceeded to cross the street; that when he first saw her he would judge that she was ten feet from the crosswalk of 65th street and was walking in a northeasterly direction. He says that when he first saw the deceased the northbound car was 125 feet south of 65th street; that he had worked for the street railway company as a motorman and judged the speed of the northbound car to be 25 miles an hour. He says that the deceased did not exactly run but that she was in a hurry; that from the time he first saw her until she was struck she travelled 10 or 11 feet.

Oliver, another witness for plaintiff, says that at the time of the accident he was driving west on 65th street; that a street car was coming south and he waited until that car went by; that it stopped to let off some passengers; that there were two cars coming from the south going north on Ashland avenue; that he saw the deceased in the middle of the street; that she got to about the center of the last car track when she was struck by a northbound Ashland avenue car and dragged about 75 or 100 feet before the car stopped. He estimates the speed of the car to be 25 miles an hour. He says that when he first saw deceased the

to be due to twelve miles an hour. His evidence in this respect is corroborated by the witnesses who say that they were riding on the front platform on a southbound car north of the intersection. They say that the street cars proceeded then and that there cars were followed by the truck. These witnesses also say that the accident occurred from 20 to 100 feet north of the north curb of 25th street.

On the other hand, Nolan, a witness for plaintiff, who at the time of the accident was standing on the northeast corner of 25th street and Indiana avenue, says that the deceased came from behind a car that was going south; that she stepped out into north and south and then proceeded to cross the street; that when he first saw her he would judge that she was ten feet from the crosswalk of 25th street and was walking in a northeasterly direction. He says that when he first saw the deceased the northbound car was 125 feet south of 25th street; that he had worked for the street railway company as a motorman and judged the speed of the northbound car to be 25 miles an hour. He says that the deceased did not actually run but that she was in a hurry; that from the time he first saw her until she was struck she travelled in or 12 feet.

Oliver, another witness for plaintiff, says that at the time of the accident he was driving west on 25th street; that a street car was coming south and he waited until that car was by; that it stopped to let off some passengers; that there were two cars coming from the south going north on Indiana avenue; that he saw the deceased in the middle of the street; that she got to about the center of the last car track when she was struck by a northbound Indiana avenue car; that it stopped about 20 or 30 feet before the car stopped. He estimates the speed of the car to be 25 miles an hour. He says that when he first saw deceased the

northbound car was south of the south intersection and that when the car struck her it was travelling at about the same rate of speed as when he first saw it.

Defendants make much of the fact that one of plaintiff's witnesses who on the former trial testified that deceased was walking on the crosswalk, upon this trial said that she was ten feet north of it, and they say that since the motorman and the Englands, the passengers on a southbound car, testified that she was far north of the crosswalk the preponderance of the evidence is to the effect that she was not on the crosswalk but north of it. They therefore argue that she was negligent in that she did not use reasonable care in crossing the track just prior to the accident but allowed herself to get into a position of danger and peril. They cite a number of cases such as Roberts v. Chicago City Ry. Co., 262 Ill. 228; Hooper v. Adams Express Co., 289 Ill. 169; Bushman v. Calumet & So. Chicago Railway Co., 214 Ill. App. 435; Jarosazewski v. Chicago Railways Co., 241 Ill. App. 1; all of which lay down the rule that it may be negligence such as will bar a recovery for a person to get into a dangerous position from which he is unable to extricate himself.

On the former appeal this court held that there was a question for the jury as to the exercise of due care on the part of the deceased. We are bound by that holding. However, there remains in this case for our consideration the question which did not arise on the former appeal, namely, of whether a verdict for plaintiff on that issue is against the manifest weight of the evidence. Of course, no two cases of this sort are just alike, and an examination of the authorities will disclose many circumstances by which such cases may be distinguished.

The testimony of the Englands seems quite improbable. The conductor upon cross-examination almost admitted that he was not

negligence nor was guilty of the much misinterpretation and less than the car struck her if was travelling as about ten miles an hour as when he first saw it.

Defendants make much of the fact that one of plaintiff's witnesses who on the former trial testified he had discovered was walking on the crossing, upon this trial said that he was too far north of it, and that he thought that since the motorman and the brakeman, who testified on a motion for a nonsuit, testified that she was far north of the crossing the preponderance of the evidence is to the effect that she was not on the crossing but north of it. They therefore argue that she was negligent in that she did not use reasonable care in crossing the track just prior to the accident but allowed herself to get into a position of danger and peril. They cite a number of cases such as Pfeifer v. Chicago City Ry. Co., 201 Ill. 346; Chicago & Joliet Electric Ry. Co. v. Kinney, 95 Ill. 267; Chicago & Oak Park Elevated R. R. Co. v. Pierce, 148 Ill. 202; Chicago Union Traction Co. v. Carroll, 199 Ill. 488; Chicago Railways Co. v. Mitchell, 202 Ill. 396. It was of course, Jay Sam the rule that it may be negligence such as will bar a recovery for a person to get into a dangerous position from which he is unable to extricate himself.

On the former appeal this court held that there was a question for the jury as to the exercise of due care on the part of the deceased. We are bound by that ruling. However, there remains in this case for our consideration the question which did not arise on the former appeal, namely, of whether a verdict for plaintiff on that issue is against the manifest weight of the evidence. Of course, no two cases of this sort are just alike, and the consideration of the authorities will indicate many distinctions of which that cases may be distinguished.

The testimony of the engineer gives rise therefrom. The testimony upon cross-examination showed that he was not

looking carefully ahead of him, and the testimony of plaintiff's witnesses seems to us the more reliable because they had a better opportunity to observe and one of them special experience in estimating distances and speed.

If the jury was of the opinion that the deceased at the time she received her injury was on or within a few feet of the crosswalk, we think we cannot, weighing the evidence, say that the verdict is against its clear preponderance. We do not, under all the circumstances, regard the question of whether deceased was precisely upon this crosswalk as of controlling importance. It is true that pedestrians for obvious reasons should usually use the crosswalk in moving over an intersection, but there may be circumstances which would excuse such conduct. This was not, so far as the evidence shows, a crowded thoroughfare such as appeared in the Roberts case, where the plaintiff undertook to cross Clark street near Monroe in the heart of the city.

It is suggested that under the circumstances such as appeared here, if the deceased had looked she would have seen the northbound car approaching, and the familiar rule that a court will not permit one to say that he looked and did not see when it is apparent from all the evidence that if he had looked he would have seen is invoked. The testimony of the deceased is not here. The evidence justifies the inference that she looked and that she saw. It further justifies the inference that she had reason to believe that she could safely cross the track before the arrival of the northbound car. If she was walking a few feet north of the crosswalk she had more reason to think so. The real question for the determination of the jury was whether the deceased, in the exercise of reasonable care at the moment she reached the rail of the northbound track, could reasonably think she could cross without putting herself in a position of peril. Loftus v. Chicago Railways Co.,

looking accusingly about at him, and the testimony of plaintiff's witnesses seems to us the more reliable because they had a better opportunity to observe and use of them special experience in estimating distances and speed.

If the jury was of the opinion that the deceased at the time she received her injury was on or within a few feet of the crosswalk, we think we cannot, weighing the evidence, say that the verdict is against its clear preponderance. We do not, under all the circumstances, regard the question of negligence discussed the previously upon this crosswalk as of controlling importance. It is true that pedestrians for obvious reasons should usually use the crosswalk in moving over an intersection, but there may be circumstances which would excuse such conduct. This was not, so far as the evidence shows, a crowded thoroughfare such as appeared in the Pfeifer case, where the plaintiff ventured to cross Clark street from Lincoln in the street of the city.

It is suggested that under the circumstances such as appeared here, if the deceased had looked she would have seen the approaching car, but the jury could have seen the motorman and approaching car, and the familiar rule that a court will not permit one to say that he failed and did not see when it is apparent from all the evidence that if he had looked he would have seen is invoked. The testimony of the deceased is not here. The evidence justifies the inference that she looked and that she saw. In further justifies the inference that she had reason to believe that she could safely cross the track before the arrival of the motorman car. If she was walking a few feet north of the crosswalk she had more reason to think so. The real question for the determination of the jury was whether the deceased, in the exercise of reasonable care at the moment she reached the rail of the north bound track, could reasonably think she could cross without putting herself in a position of peril. Pfeifer v. Chicago Railways Co.,

293 Ill. 475. We are not unaware that upon these issues of negligence on the part of defendants and contributory negligence on the part of plaintiff's intestate, the questions of fact were close, but they were for the jury, and as the jury has settled them, this court will not under circumstances such as appear here, substitute its judgment for theirs.

In a case so close upon the facts, however, defendants were entitled to have the jury carefully and accurately instructed as to the law applicable. Chicago & Eastern Ill. R. R. Co. v. Bonworth, 203 Ill. 192; Chicago & Alton R. R. Co. v. Kelly, 210 Ill. 449; Lavender v. Chicago City Ry. Co., 296 Ill. 384.

Complaint is made of the fourth instruction given at the request of plaintiff. It is as follows:

"The jury are instructed that if they believe from the evidence that the street car of the defendant which struck and killed the plaintiff's intestate was driven across the intersection of 65th street and Ashland avenue at such a rate of speed that it could not be readily brought to a standstill so as to avoid injury to pedestrians who might be crossing Ashland avenue at 65th street, and if you believe from the evidence that Marie Powers in crossing Ashland avenue at 65th street was exercising that care and caution which an ordinarily prudent person would exercise under such circumstances, then you will find the issues for the plaintiff."

The objection to this instruction in the first place is that it assumed, contrary to the testimony of four witnesses, that the deceased was crossing at 65th street, and defendants contend and cite authorities to the effect that it is error to assume in an instruction the existence of an important fact where the evidence is in conflict, especially where a larger number of witnesses testify to a fact contrary to that which the instruction assumes. People v. Harvey, 286 Ill. 593; People v. O'Connor, 295 Ill. 198; O'Connell v. Dunn, 190 Ill. App. 523; Goldstein v. Greenstone, 223 Ill. App. 511; Lindenberger v. Klapp, 254 Ill. App. 192, are cited. Two of these are criminal cases, but there seems to be no good reason why the rule cited should not be applicable in a civil case which is close upon the facts.

The most important issue of fact upon defendants' theory of the case is whether deceased was actually crossing Ashland avenue at 65th street or at some place considerably north of it. The instruction should not have assumed that she was crossing at 65th street. That matter should have been left to the jury, and as the instruction directed a verdict there was every reason that the respective contentions of the parties should have been recognized.

It is further contended by defendants that this instruction was erroneous, in that it told the jury that defendants should not have driven their car across the intersection at such rate of speed that it could not have been readily brought to a standstill so as to avoid injury to pedestrians. Defendants say that the necessary implication in this instruction is that a street car company must stop the car and avoid injury to pedestrians who may be crossing an intersection. They say the law does not impose such an absolute duty but imposes only that ordinary care should be used to avoid injury; that it is for the jury and not for the court to determine what speed under the circumstances is or is not negligence. They point out that the instruction does not limit defendants to the exercise of ordinary care or to any degree of care, but makes it imperative that the speed of the street car should be such that without regard to the circumstances it could be stopped and injury to pedestrians avoided. Defendants also say that there was evidence submitted by them to the effect that the deceased ran out from behind a truck and in front of the car when it was very close to her; that the rule laid down in the instruction would require that defendants' car should have been operated at a speed that would have made it possible that the car could have been stopped and injury to deceased under such circumstances prevented. The result, they contend, would have been the same if defendants were held to

The most important issue of law, upon defendants' demurrer of the case in question concerned the authority controlling manners as good street or at some place consistently north of it. The instruction should not have assumed that the crossing at 60th street. That matter should have been left to the jury, and so the instruction directed a verdict where was every reason that the respective contentions of the parties should have been presented.

It is further contended by defendants that this instruction was erroneous, in that it told the jury that defendants should not have driven their car across the intersection at such rate of speed that it could not have been readily brought to a standstill so as to avoid injury to pedestrians. Defendants say that the necessary implication in this instruction is that a driver our company must stop the car and avoid injury to pedestrians who may be crossing an intersection. They say the law does not impose such an absolute duty but imposes only that ordinary care should be used to avoid injury; that it is for the jury and not for the court to determine what speed under the circumstances is or is not negligence. They point out that the instruction does not limit defendants in the exercise of ordinary care or to any degree of care, but makes it imperative that the speed of the street car should be such that without regard to the circumstances it could be stopped and injury to pedestrians avoided. Defendants also say that there was evidence submitted by them to the effect that the deceased had not from behind a tree and in front of the car when it was very close to her; that the rule laid down in the instruction would require that defendants' car should have been operated at a speed that would have made it possible that the car could have been stopped and injury to deceased under such circumstances prevented. The result, they contend, would have been the same if defendants were held to

be insurers of the safety of the deceased.

We think there is merit in these contentions. It was not for the court to tell the jury that it was negligence to drive the street car across the intersection at such speed that it could not be readily brought to a standstill so as to avoid injury to pedestrians. The speed at which the car was operated across the intersection was a matter in which regard should have been had to all the circumstances existing, and the law imposed upon defendants only the exercise of ordinary care in view of all these circumstances. The instruction in this respect we think invaded the province of the jury. Pienta v. Chicago City Ry. Co., 234 Ill. Ill. 246; Tracey v. Chicago Ry. Co., 185 Ill. App. 125; Wimmer v. Chicago Rys. Co., 185 Ill. App. 523. See also Chicago & Iowa R.R. Co. v. Lane, 130 Ill. 116; Pennsylvania Co. v. McCaffrey, 173 Ill. 169; City of LaSalle v. Kostka, 190 Ill. 130.

Again, it is contended that this instruction was erroneous in that it practically took away from the jury the question of whether the deceased was negligent in failing to look out for danger before crossing the tracks. She was, of course, under the decisions, obligated to use due care, not only in crossing but also in the determination of whether she would cross at the time she did and the way she did. The care required of her was not only in going across at the time the accident occurred but also in undertaking to go across in the way she did. If through failure to exercise due care she got herself into a position of danger, she would not be excused although she might have exercised the greatest degree of care in attempting to extricate herself from it. Such was the law as laid down in Roberts v. Chicago Ry. Co., 262 Ill. 226, and in other cases such as Chicago, Milwaukee & St. Paul Ry. Co. v. Halsey, 133 Ill.248; North Chicago St. R. R. Co. v. Cossar, 203 Ill. 608; Ratner v.

to insurers of the safety of the deceased.

We think there is merit in these contentions. It was not for the court to tell the jury that it was negligence to drive the street car across the intersection at such speed that it could not be readily brought to a standstill so as to avoid injury to pedestrians. The speed at which the car was operated across the intersection was a matter in which regard should have been had to all the circumstances existing, and the law imposed upon defendants only the exercise of ordinary care in view of all these circumstances. The instruction in this respect we think invaded the province of the jury. Plante v. Milwaukee City R. Co., 104 Wis. 111, 80; Pickard v. Milwaukee Ry. Co., 108 Wis. 401, 417; Thomas v. Milwaukee Elec. Ry., 108 Wis. 409. See also Milwaukee & Lake R.R. Co. v. Long, 107 Wis. 119; Pennsylvania Co. v. Schultz, 175 Ill. 129; City of Lafayette v. Redfern, 180 Ill. 130.

Again, it is contended that this instruction was erroneous in that it practically took away from the jury the question of whether the deceased was negligent in failing to look out for danger before crossing the tracks. The rule, of course, under the circumstances obligated to use due care, not only in crossing but also in the determination of whether she would cross at the time she did and the way she did. The care required of her was not only in going across at the time the accident occurred but also in undertaking to go across in the way she did. If through failure to exercise due care she got herself into a position of danger, she could not be excused although she might have exercised the greatest degree of care in attempting to extricate herself from it. That was the law as laid down in Sabrie v. Milwaukee Ry. Co., 102 Wis. 544, and in other cases as Dickson, Murphey & Co. Coal Co. Co. v. Kelsey, 130 Ill. 314; Illinois Cent. R. R. Co. v. Jones, 148 Ill. 456; Chicago &

Chicago City Ry. Co., 233 Ill. 169; Fowler v. Chicago & Eastern Ill. R. R. Co., 234 Ill. 619.

Complaint is also made of plaintiff's instruction No. 3, which is as follows:

"The court instructs the jury as a matter of law that it is incumbent upon persons operating street cars to exercise a higher degree of care when approaching street intersections where pedestrians are accustomed to cross than at other places along the route, and that it is the duty of the person in charge of electrically propelled cars when approaching street intersections to have their cars under such control as to enable them to bring the car readily to a standstill so as to avoid injury to pedestrians who might be expected to and who are accustomed to cross at such street intersections."

Defendants say that there are only two degrees of care recognized in the law of negligence in this State, namely, ordinary care and the highest degree of practicable care; that by requiring a higher degree of care when approaching street intersections this instruction called for something more than ordinary care and therefore laid down a rule which is contrary to the law of negligence in this State. Defendants point out in criticism of this instruction that the accident did not happen while the street car was approaching the intersection, but according to all the evidence it happened as the car was leaving or after it had left the intersection, and that the speed of the car at or when the approach to the place of the accident was being made, not the speed of the car when it was approaching the intersection, is of material importance. They say that there was evidence tending to show that the street car was traveling as fast as 25 miles an hour when it approached the intersection, and that it was going between 18 and 20 miles an hour at that time, and that the speed was cut down to between 10 and 12 miles an hour as the car crossed the intersection. It is complained that the instruction gave the jury to understand that the speed of the car when it was approaching the intersection, rather than the reduced speed at and approaching the place of the accident,

Kansas City So. Ry., 251 Ill. 246; Baker v. Chicago & Eastern Ill. R. R. Co., 252 Ill. 232.

Complaint is also made of plaintiff's instruction No. 2, which is as follows:

"The court instructs the jury as a matter of law that if a locomotive upon railroad tracks approaching street is approaching a highway or more than ordinarily street intersections where pedestrians are accustomed to cross them at other places along the track, and that it is the duty of the person in charge of such locomotive, when approaching street intersections to ring the bell or sound the whistle, and to use the care and diligence that a reasonably careful person would use under such circumstances to prevent injury to a pedestrian, or to avoid injury to persons who might be expected to and who are accustomed to cross at such street intersections."

Defendants say that there are only two degrees of care recognized in the law of negligence in this state, namely, ordinary care and the highest degree of practicable care; that by requiring a higher degree of care when approaching street intersections this instruction called for something more than ordinary care and therefore laid down a rule which is contrary to the law of negligence in this state. Defendants point out in criticism of this instruction that the accident did not happen while the street car was approaching the intersection, but according to all the evidence it happened as the car was leaving or after it had left the intersection, and that the speed of the car at or when the approach to the place of the accident was being made, not the speed of the car when it was approaching the intersection, is of material importance. They say that there was evidence tending to show that the street car was traveling as fast as 25 miles an hour when it approached the intersection, and that it was going between 18 and 20 miles an hour at that time, and that the speed was cut down to between 10 and 12 miles an hour as the car crossed the intersection. It is contended that the instruction gave the jury to understand that the speed of the car when it was approaching the intersection, rather than the reduced speed at and approaching the place of the accident

was the basis on which to consider the care of the motorman. It is also urged that the instruction is subject to criticism in that it reiterated the erroneous rule of negligence as given to the jury in instruction No. 4. We think the instruction is justly subject to criticism on that ground.

The court refused defendants' request to give the following instruction:

"You are instructed that the motorman of the street car in question was not required to exercise the highest degree of care to avoid injuring the deceased upon the occasion in question, but was only required to exercise ordinary care; and if you believe from the evidence in this case, under the instruction of the court, that as the street car approached the place of the occurrence it was being operated with ordinary care, and that the motorman thereof, in the exercise of ordinary care, did all he could to avoid the accident in question as soon as it was apparent, or ascertainable to him, in the exercise of ordinary care, that the deceased was coming into a position of danger in front of his car, then the plaintiff cannot recover in this case."

Plaintiff contends that it was not error to refuse this instruction because it assumes that the motorman is required to exercise no greater degree of care in approaching a street crossing than at other places along the street, and it is said that this is not the law of this State, citing West Chicago St. Ry. Co. v. Fetters, 196 Ill. 288. That case, however, does not sustain the contention, since it distinctly states, "It was the duty of appellant and its servants in approaching crossings to so regulate the speed of its cars that collisions with other persons having the right to cross such streets could, by the exercise of ordinary care, be avoided." The instruction is not subject to the criticism. It correctly states the law, and we think it should have been given.

For the errors indicated the judgment must be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

was the basis on which to consider the care of the motorman. It is also urged that the instruction is subject to criticism in that it reiterated the erroneous rule of negligence as given to the jury in instruction No. 4. We think the instruction is hardly subject to criticism on that ground.

The court refused defendants' request to give the following instruction:

"You are instructed that the motorman of the street car in question was not required to exercise the highest degree of care to avoid injuring the deceased upon the occasion in question, but was only required to exercise ordinary care; and if you believe from the evidence in this case, under the instruction of the court, that as the street car approached the place of the occurrence it was being operated with ordinary care, and that the motorman thereof, in the exercise of ordinary care, did all he could to avoid the accident in question as soon as it was apparent, or reasonable to him, in the exercise of ordinary care, that the deceased was coming into a position of danger in front of his car, then the plaintiff cannot recover in this case."

Plaintiff contends that it was not error to refuse this instruction because it assumes that the motorman is required to exercise no greater degree of care in approaching a street crossing than at other places along the street, and it is said that this is not the law of this State, citing Yazoo Chinese Ry. Co. v. Fortner, 109 Ill. 328. That case, however, does not sustain the contention, since it distinctly states, "It was the duty of engineer and its servants in charge of the engine to regulate the speed of the cars that collision with other persons having the right to cross such streets could, by the exercise of ordinary care, be avoided." The instruction is not subject to the criticism. It correctly states the law, and we think it should have been given.

For the errors indicated the judgment must be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

Dietrich, P. J., and O'Connor, J., concur.

36221

CHARLES ABRAMSON,
Plaintiff in Error,

vs.

BLUE MOTOR COACH LINES,
a Corporation,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages for personal injuries. There was a jury trial and a verdict and judgment for the defendant, and plaintiff prosecutes this writ of error.

The record discloses that about one o'clock on the afternoon of October 18, 1930, plaintiff, a man about forty-six years of age, was driving his Chevrolet motor truck in Ogden avenue near Sawyer avenue when it was struck by one of defendant's buses which was being driven from Peoria to Chicago. The truck was thrown against a trolley pole in the center of Ogden avenue and plaintiff was severely injured. Ogden avenue runs in a northeasterly direction and is intersected by Sawyer avenue to the east and Spalding avenue to the west of the place in question. At the time, plaintiff was engaged in the plating business conducted in a one-story brick building at 3249 Ogden avenue; and lived with his family at 1907 South Harding avenue, more than a mile southwest of his place of business. On the day in question his son, nineteen years of age, was working with his father, and about noon took the truck and drove home to get his lunch; about one o'clock he returned with the truck and left it standing headed in an easterly direction in Ogden avenue about twelve feet from the east curb line. The truck was standing back of automobiles and trucks which were facing the east curb. The son left the motor running because his father wanted

[illegible]

[illegible] ARMBRUSTER,
Plaintiff in Error,

vs.

[illegible] SOUTH BEACH LINES,
a Corporation,
Defendant in Error.

[illegible] IN ERROR TO THE
[illegible] COURT,

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages for personal injuries. There was a jury trial and a verdict and judgment for the defendant, and plaintiff prosecutes this writ of error.

The record discloses that about one o'clock on the afternoon of October 16, 1926, plaintiff, a man about forty-six years of age, was driving his overloaded motor truck in Ogden avenue near Lawrence avenue when it was struck by one of defendant's buses which was being driven from Racine to Chicago. The truck was thrown against a trolley pole in the center of Ogden avenue and plaintiff was severely injured. Ogden avenue runs in a northwesterly direction and is intersected by Lawrence avenue to the east and leading avenue to the west of the place in question. At the time, plaintiff was engaged in the plaiting business conducted in a one-story brick building at 3848 Ogden avenue; and lived with his family at 1827 South Harding avenue, more than a mile southwest of his place of business. On the day in question his son, nineteen years of age, was working with his father, and about noon took the truck and drove home to get his lunch; about one o'clock he returned with his lunch and left it standing parked to be easily driven in Ogden avenue about twelve feet from the east curb line. The truck was standing back of automobiles and trucks which were facing the east curb. The son left the motor running because his father wanted

to take the truck and go to his lunch; the father came out, got into the truck, started in an easterly direction, pulled over toward the middle of the street, when defendant's motor coach, which was being driven easterly in Ogden avenue, struck the truck on the left side near the rear and threw it over against a trolley pole standing in the middle of Ogden avenue between two street car tracks. Plaintiff was thrown out of the truck and the coach crushed plaintiff's foot so that it was necessary to amputate it. Ogden avenue is 150 feet wide; from curb to curb it is 110 feet; in the center of the street there are two street car tracks, the trolley poles are located 100 feet apart between the two tracks.

Plaintiff's theory of the case was and is that when he got into the truck, which was standing about twelve or fifteen feet from the easterly curb of Ogden avenue and headed easterly, he intended to drive about one and a half blocks east for his lunch and then drive farther down Ogden avenue to do an errand; that he started up and gradually pulled over towards the street car tracks so as not to be too close to the automobiles parked along the easterly curb in case they should back out, and when he had traveled about sixty-five or seventy feet and had almost reached the first street car track the truck was struck by the bus which was traveling from thirty-five to forty-five miles an hour. A number of witnesses called by plaintiff gave testimony tending to sustain his theory of the case.

The defendant's theory is that the bus was traveling in the easterly street car track or straddling the east rail of that track going about twenty to twenty-five miles an hour; that plaintiff started the truck and after he had traveled a very short distance suddenly turned across in front of the motor coach; the driver of the coach applied his brake and attempted to turn the coach to the

to take the truck out so to his lunch; the driver came out, got into the lunch, started in an southerly direction, making over several the width of the street. Mike Jarmelnit's motor cycle, which was being driven westerly in Ogden avenue, struck the truck on the left side near the rear and threw it over against a trolley pole standing in the middle of Ogden avenue between the street car tracks. Plaintiff was thrown out of the truck and the cycle crushed plaintiff's foot so that it was necessary to amputate it. Ogden avenue is 130 feet wide; from curb to curb it is 110 feet; in the center of the street there are two street car tracks, the trolley poles are located 100 feet apart between the two tracks.

Plaintiff's theory of the case was and is that when he got into the truck, which was standing about twelve or fifteen feet from the southerly curb of Ogden avenue and headed westerly, he intended to drive about one and a half blocks east for his lunch and then drive further down Ogden avenue to a street; that he started up and gradually pulled over towards the street car tracks so as not to be too close to the motorcycle parked along the southerly curb in case they should back out, and when he had traveled about eighty or twenty feet and had almost reached the first street car track the truck was struck by the bus which was traveling from thirty-five to forty-five miles an hour. A number of witnesses called by plaintiff gave testimony tending to sustain his theory of the case.

The defendant's theory is that the bus was traveling in the southerly street car track or straddling the west rail of that track going about twenty to twenty-five miles an hour; that plaintiff started the truck and after he had traveled a very short distance suddenly turned across in front of the motor coach; the driver of the coach applied his brake and attempted to turn the coach to the

east to avoid a collision, but was unable to do so. There were seven or eight passengers in the motor coach at the time and a number of them testified to the effect that the truck suddenly turned across the street in front of the bus and that the collision was unavoidable.

Plaintiff contends that the verdict and judgment are against the manifest weight of the evidence. We have carefully considered all the evidence in the record and are of the opinion that the great weight of the evidence is as testified to by witnesses for the defendant - that plaintiff suddenly and without warning turned across the street in front of the bus. We think the only reasonable theory of plaintiff's action in driving the truck at the time, was that he intended to turn around in Ogden avenue and drive to his home for lunch. One of plaintiff's witnesses, a young man who worked for him, testified that at the time of the accident plaintiff "was going home to dinner" - that he did not know where he was going. While plaintiff testified that he was driving farther down Ogden avenue to obtain his lunch, and while counsel for plaintiff says that plaintiff was not going to make a "U" turn, and this is conceded by counsel for the defendant, yet, as we have stated, we think his action showed that he was intending to turn around in Ogden avenue. But in any view of the case, we are clearly of the opinion that we would not be warranted in disturbing the verdict and judgment on the ground that they are manifestly against the weight of the evidence.

Plaintiff further contends that the court erred in giving instructions numbers 7, 11, 13, 14, 20 and 22, requested by the defendant.

Instruction No. 7 told the jury that if they believed from a preponderance of the evidence plaintiff was injured as the result of a mere accident which occurred without the fault of the plaintiff or the defendant, that they should find the defendant not guilty.

sect to avoid a collision, but was unable to do so. There were seven or eight passengers in the motor coach at the time and a number of them testified to the effect that the truck suddenly turned across the street in front of the bus and that the collision was unavoidable.

Plaintiff contends that the verdict and judgment are against the manifest weight of the evidence. We have carefully considered all the evidence in the record and are of the opinion that the great weight of the evidence is as testified to by witnesses for the defendant - that plaintiff suddenly and without warning turned across the street in front of the bus. We think the only reasonable theory of plaintiff's action in driving the truck at the time, was that he intended to turn around in Ogden Avenue and drive to his home for lunch. One of plaintiff's witnesses, a young man who worked for him, testified that at the time of the accident plaintiff "was going home to dinner" - that he did not know where he was going. While plaintiff testified that he was driving further down Ogden Avenue in order to turn around, and while counsel for plaintiff says that plaintiff was not going to make a "U" turn, and this is conceded by counsel for the defendant, yet, as we have stated, we think the action showed that he was intending to turn around in Ogden Avenue. But in any view of the case, we are clearly of the opinion that we would not be warranted in disturbing the verdict and judgment on the ground that they are manifestly against the weight of the evidence.

Plaintiff further contends that the court erred in giving instructions numbers 7, 11, 17, 24, 30 and 32, requested by the defendant.

Instruction No. 7 told the jury that if they believed from a preponderance of the evidence plaintiff was injured as the result of a mere accident which occurred without the fault of the plaintiff or the defendant, that they should find the defendant not guilty.

The argument is that the evidence all showed the collision was not the result of a mere accident without fault on the part of either plaintiff or the driver of the truck, but that it was clear that one or the other, or both, was guilty of negligence. There is some merit in this point, but we are certain under the facts in this case, which are simple and not complicated, that it did not prejudicially affect plaintiff.

By instruction No. 11 the jury was told that the plaintiff was required by law "to establish his case by a preponderance of the evidence," etc., before he could recover, and that the law does not require plaintiff in such a case to "establish" his case. The word "establish" as used in somewhat similar instructions has been criticized, but under the facts in this case we think any error in this respect would not warrant us in disturbing the judgment.

The jury was instructed by No. 13 that the plaintiff could not recover unless the jury believed from a preponderance of the evidence (1) that plaintiff was exercising ordinary care for his own safety at and prior to the time of the accident; (2) that the defendant was guilty of negligence as charged in the declaration; (3) that such negligence was the proximate and direct cause of the injury. It is contended that this instruction is erroneous because it is the law that plaintiff could recover if he proved his case as alleged in any one count; that the declaration, as the cause went to the jury, consisted of three counts which charged different acts of negligence, and that proof of one count would be sufficient. The instruction did not limit the jury to any particular count but applied to the three counts equally. Before plaintiff could recover under any count he was required, under the law, to prove by a preponderance of the evidence the three elements specified in the instruction. We think the instruction is not subject to the objection made.

The argument is that the evidence all showed the collision was not the result of a mere accident without fault on the part of either plaintiff or the driver of the truck, but that it was clear that one or the other, or both, was guilty of negligence. There is some merit in this point, but we are dealing under the facts in this case, which are simple and not complicated, what is did not prejudicially affect plaintiff.

In instruction No. 5, the jury was told that the plaintiff was required by law "to establish his case by a preponderance of the evidence," etc., before he could recover, and that the law does not impose similar burden on such a case to "establish" his case. The word "establish" is used in somewhat similar instructions that have criticized, but after the jury in this case we think any error in this respect would not warrant us in disturbing the judgment.

The jury was instructed by No. 12 that the plaintiff could not recover unless the jury believed from a preponderance of the evidence (1) that plaintiff was exercising ordinary care for his own safety at and prior to the time of the accident; (2) that the defendant was guilty of negligence as charged in the complaint; (3) that such negligence was the proximate and direct cause of the injury. It is contended that this instruction is erroneous because it is the law that plaintiff could recover if he proved his case as alleged in any one count; that the instruction, as the court read it to the jury, consisted of three clauses which covered different ways of negligence, and that proof of one count would be sufficient. The instruction did not limit the jury to any particular count but applied to the three counts generally. Under plaintiff would recover under any count he was entitled, under law, to prove by a preponderance of the evidence the three elements specified in the instruction. We think the instruction is not subject to the criticism made.

By instruction No. 14 the jury were told that if they believed from a preponderance of the evidence that while defendant was exercising ordinary care, plaintiff suddenly and unexpectedly drove his truck across the path of the coach and thereby placed himself in a position of danger, then before the defendant could be charged with want of ordinary care plaintiff must show, by a preponderance of the evidence, that defendant had an opportunity to avoid injuring plaintiff, and if these facts were not shown by the evidence the jury should find the defendant not guilty. The instruction then continued that if the jury believed from the evidence the plaintiff suddenly turned in front of the coach and the driver of the coach did all that he could in the exercise of ordinary care to avoid injuring plaintiff, then the verdict should be for the defendant. A number of objections are urged to this instruction which are rather hypercritical. While the instruction is not accurate in all respects, we think that under the facts in this case it was not so inaccurate as to warrant us in disturbing the verdict. The issues were simple and readily understood by the jury, and the instructions on the whole did not, we think, in any way prejudicially affect plaintiff. It would serve no useful purpose to analyze the several objections urged to the instructions, including instructions Nos. 20 and 22, because we have reached the conclusion that the judgment ought not to be disturbed on the ground that the jury was erroneously instructed, to the prejudice of plaintiff.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

By instruction 6a, if the jury were said that if they believed from a preponderance of the evidence that while defendant was exercising ordinary care, plaintiff suddenly and unexpectedly drove his truck across the path of the coach and thereby placed himself in a position of danger, then belief the defendant shall be charged with want of ordinary care plaintiff must show, by a preponderance of the evidence, that defendant had an opportunity to avoid injuring plaintiff, and if these facts were not shown by the evidence the jury should find the defendant not guilty. The instruction then continued that if the jury believed from the evidence the plaintiff suddenly turned in front of the coach and the driver of the coach did all that he could in the exercise of ordinary care to avoid injuring plaintiff, then the verdict should be for the defendant. A number of objections are urged to this instruction which are rather hypercritical. While the instruction is not accurate in all respects, we think that under the facts in this case it was not so inaccurate as to warrant us in disturbing the verdict. The issues were simple and readily understood by the jury, and the instructions on the whole did not, we think, in any way prejudicially affect plaintiff. It would serve no useful purpose to analyze the several objections urged to the instructions, including instructions 6a1. 3a and 5a, because we have reached the conclusion that the judgment ought not to be disturbed on the ground that the jury was erroneously instructed, to the prejudice of plaintiff.

The judgment of the Superior Court is affirmed.

Respectfully, P. J., and Ashmitt, J., concur.

36237

ADAMS CONSTRUCTION COMPANY,
a Corporation,
Appellee,

vs.

HENRY T. HOLSMAN and LAWRENCE
SWEENEY,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

269 I.A. 647[3]

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

January 2, 1931, plaintiff brought suit against the defendants to recover $527.11 claimed to be a balance due it for labor and material furnished from April 1, 1927, to January 1, 1928, in and about improving a building for defendants in Chicago.

On January 29, 1931, defendants filed an affidavit of merits in which they denied that they owed the $527.11 or any part of it for labor and material and denied any indebtedness. They further set up that the labor and material furnished by plaintiff consisted of mason and brick work; that the work was not done in good and workmanlike manner; that there was no architect's certificate; that under the terms of the contract between the parties, all defects appearing in the work within one year after completion were to be corrected by plaintiff; that there were many such defects; that the walls of the building were not waterproof and when it rained the water leaked into several apartments in the building; that plaintiff refused to correct his defective work, although requested.

The next that appears in the record is a judgment order entered May 9, 1932, which recites that by agreement the cause was tried before six jurors, and after hearing the jury retired to consider of their verdict and afterward returned their verdict into court, finding in favor of the plaintiff for the amount of its claim, $527.11. The order further shows that defendants made a motion for a new trial and on May 20th the motion was overruled,

MR. EDWIN O'CONNOR MALVERNO AND DEFENDANT.

January 6, 1925, plaintiff brought suit against the defendants to recover $527.11 claimed to be a balance due it for labor and material furnished from April 1, 1927, to January 1, 1928, in and about improving a building for defendants in Malvern.

On January 28, 1931, defendants filed an affidavit of merits in which they denied that they owed the $527.11 or any part of it for labor and material and denied any indebtedness. They further set up that the labor and material furnished by plaintiff consisted of masonry and brick work; that the work was not done in good and workmanlike manner; that there was no architect's certificate; that under the terms of the contract between the parties, all defects appearing in the work within one year after completion were to be corrected by plaintiff; that there were many such defects; that the walls of the building were not waterproof and when it rained the water leaked into several apartments in the building; that plaintiff refused to correct his defective work, although requested.

The most that appears in the record is a judgment order entered May 6, 1932, which recites that by agreement the cause was tried before six jurors, and after hearing the jury retired to consider of their verdict and afterward returned their verdict into court, finding in favor of the plaintiff for the amount of its claim, $527.11. The order further shows that defendants made a motion for a new trial and on May 6th the motion was overruled.

judgment entered on the verdict, and defendants appeal.

While the record, as above stated, recites that the evidence was heard by a jury of six, that the jury retired, considered the case and brought in a verdict in favor of the plaintiff, the bill of exceptions shows, and it is so argued by both sides, that the court directed the jury to find the issues for the plaintiff. It further appears from the bill of exceptions that no evidence was offered by either side, but that when the case was called for trial and the jury of six sworn, counsel for plaintiff moved to strike the affidavit of merits from the file. The matter was discussed for some length in chambers by court and counsel, the plaintiff moving that the court strike the affidavit of merits and direct a verdict in plaintiff's favor. The hearing was then resumed and plaintiff's motion allowed; the court struck the affidavt of merits and directed the jury to return a verdict for plaintiff for the amount of its claim, which was accordingly done.

This proceeding was anomalous. When the court struck the defendants' affidavit of merits from the files the defendants should have been defaulted, and there being no evidence offered there was nothing for a jury to decide. The court should have entered judgment on plaintiff's statement of claim.

We are further of the opinion that the court erred in striking the affidavit of merits, because we think it set up a defense to plaintiff's claim. In the affidavit of merits it was averred that plaintiff furnished labor and materials but that it did its work in such an unworkmanlike manner that the walls of the building allowed rain to leak into several of the apartments, and that under the contract entered into between the parties plaintiff was required to correct this defect but failed and refused to do so. This was a fourth class case where no formal pleadings were required, and we think the affidavit of merits was sufficient. Amer. Hard Rubber Co.

judgment entered on the verdict, and defendants appeal.

While the record, as above stated, reveals that the evidence was heard by a jury of six, that the jury retired, considered the case and brought in a verdict in favor of the plaintiff, the bill of exceptions shows, and it is so agreed by both sides, that the court directed the jury to find the issues for the plaintiff. It further appears from the bill of exceptions that no evidence was offered by either side, but that when the case was called for trial and the jury of six sworn, counsel for plaintiff moved to strike the affidavit of merits from the file. The matter was discussed for some length in chambers by court and counsel, the plaintiff moving that the court strike the affidavit of merits and direct a verdict in plaintiff's favor. The hearing was then resumed and plaintiff's motion allowed; the court struck the affidavit of merits and directed the jury to return a verdict for plaintiff for the amount of his claim, which was accordingly done.

The proposition was essential. Then the court struck the defendants' affidavit of merits from the files the defendants should have been defaulted, and there being no evidence offered there was nothing for a jury to decide. The court should have entered judgment on plaintiff's statement of claim.

We are further of the opinion that the court erred in striking the affidavit of merits, because we think it set up a defense to plaintiff's claim. In the affidavit of merits it was averred that plaintiff furnished labor and materials but that it did its work in such an unworkmanlike manner that the walls of the building allowed rain to leak into several of the apartments, and that under the contract entered into between the parties plaintiff was required to correct this defect but failed and refused to do so. This was a fourth class case where no formal pleadings were required, and we think the affidavit of merits was sufficient. Amer. Hand Rubber Co.

v. Howe, 280 Ill. 431.

For the reasons stated the judgment of the Municipal Court of Chicago is reversed and the cause remanded for further proceedings in accordance with the views stated in this opinion.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

36256

THE LEADER STORES, a Corporation,
Appellee,

vs.

UNION INDEMNITY COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

47

269 I.A. 647

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendant under a policy issued insuring plaintiff against loss on account of burglary. There was a jury trial and a verdict and judgment in plaintiff's favor for $4372.66, and the defendant appeals.

The record discloses that defendant issued its policy whereby it agreed to indemnify plaintiff against loss caused by burglary while the policy was in force. Counsel for defendant state that "a person or persons unknown to the plaintiff made a hole through the brick wall into the Leader store thereby gaining access to the same, blew the door of the safe open with nitroglycerin, causing alleged damage to merchandise in and about the safe to the safe and the loss of some cash."

It appears from the evidence that on Saturday evening, May 17, 1930, plaintiff's store was closed, the money put in the safe and the safe and store locked. When plaintiff returned to the store Monday morning, May 19th, he found it had been burglarized, as above stated. Plaintiff immediately notified the police and representatives of the defendant company. Defendant's representative went to the store and investigated the matter. The evidence further shows that afterward the policy of insurance was handed by plaintiff to the defendant's representative and also the cash register tape which showed the amount of the sales and the money put in the safe just before closing Saturday evening and the safe locked. There is also evidence that plaintiff made out proofs of loss and they were mailed

[illegible]

THE LIBERTY MUTUAL, a Corporation,
Appellee.

vs.

UNITED INDEMNITY COMPANY, a Corporation,
Appellant.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action at nisi prius against the defendant under a policy issued insuring plaintiff against loss on account of burglary. There was a jury trial and a verdict and judgment in plaintiff's favor for $[illegible], and the defendant appeals.

The record discloses that defendant issued the policy whereby it agreed to indemnify plaintiff against loss caused by burglary while the policy was in force. Upon proof of defendant's claim that "a person or persons unknown to the plaintiff made a hole through the brick wall into the liquor store thereby gaining access to the same, blew the door of the safe open with nitroglycerin, causing alleged damage to merchandise in and about the safe in the safe and the loss of some cash."

It appears from the evidence that on Saturday evening, May 17, 1930, plaintiff's store was closed, the money put in the safe and the safe and store locked. When plaintiff returned to the store Monday morning, May 19th, he found it had been burglarized, as above stated. Plaintiff immediately notified the police and representative of the defendant company. Defendant's representative went to the store and investigated the matter. The evidence further shows that afterward the policy of insurance was handed by plaintiff to the defendant's representative and also the cash register book which showed the amount of the sales and the money put in the safe just before closing Saturday evening and the safe locked. There is also evidence that plaintiff made out proofs of loss and they were mailed

to an agent of the defendant company within ten days after the burglary.

The defendant denied liability. It filed a plea of the general issue with notice of special defenses, in which it denied that plaintiff had suffered any loss, alleged that there was a breach of warranty with reference to "Item 16" of the policy and tendered back the insurance premium paid by the plaintiff.

On the trial of the case the defendant offered no evidence. The jury were instructed, both plaintiff and defendant submitting instructions. The jury returned a verdict in favor of the plaintiff for the amount of its claim.

The defendant contends that the court erred in admitting a copy of the insurance policy in evidence on the ground that it was not proven to be a true copy of the policy. The evidence showed that the policy had been turned over to the defendant shortly after the burglary and plaintiff's counsel had served notice on the defendant to produce the original, which it failed to do. Plaintiff then offered in evidence a copy of the policy which the testimony showed was given to it by the defendant as a "specimen copy" of the policy issued. There is no merit in the contention, and the court did not err in admitting the copy in evidence.

A further point is made that plaintiff failed to make proof of loss as required by the policy. Defendant in its brief quotes the evidence given by a witness called by plaintiff, which is as follows: "The proof of loss was furnished to me. I took it out to The Leader Stores, had it filled out and signed by Mr. Ginsburg [plaintiff's secretary.] It was mailed to Mr. McDaniel, chief claim agent of the Union Indemnity Company. I am not sure what date this proof of loss was sent, but I think it was about a week or ten days after the loss." Prior to the trial counsel for the

to an agent of the defendant company within ten days after the burglary.

The defendant denied liability. It filed a plea of the general issue with notice of special defenses, in which it denied that plaintiff had suffered any loss, alleged that there was a breach of warranty with reference to "Item 16" of the policy and tendered back the insurance premium paid by the plaintiff.

At the trial of the case the defendant offered no evidence. The jury was instructed, both plaintiff and defendant submitting instructions. The jury returned a verdict in favor of the plaintiff for the amount of its claim.

The defendant contends that the court erred in admitting a copy of the insurance policy in evidence on the ground that it was not proven to be a true copy of the policy. The evidence showed that the policy had been burned over in the defendant's office after the burglary and plaintiff's counsel had served notice on the defendant to produce the original, which it failed to do. Plaintiff then offered in evidence a copy of the policy which the testimony showed was given to it by the defendant as a "specimen copy" of the policy issued. There is no merit in the contention, and the court did not err in admitting the copy in evidence.

A further point is made that plaintiff failed to make proof of loss as required by the policy. Defendant in its brief quotes the evidence given by a witness called by plaintiff, which is as follows: "The proof of loss was furnished to me. I took it out to The Leader Store, had it filled out and signed by Mr. Gleason [illegible]'s partner[illegible]. It was mailed to Mr. McDonald, adjuster of the Union Insurance Company. I do not know that this proof of loss was sent, but I think it was about a week or ten days after the loss." Prior to the total recovery for the

plaintiff served notice on the defendant to produce the original proof of loss but it failed to do so. No complaint was made on the hearing that the testimony offered by plaintiff, as above quoted, was insufficient because it did not specifically set forth all of the facts shown by the proofs of loss. Under these circumstances we think it obvious that there is no merit in the contention. Defendant had been given proofs of loss and failed and refused to produce them on the hearing. Plaintiff was then warranted in producing other evidence that proof of loss had been made. But no proofs of loss were required because the defendant denied liability prior to the suit. In a letter of August 5, 1930, defendant stated to plaintiff, "Our investigation of this alleged loss leads us to believe that it is one which is not covered under the terms of your policy. *** we must respectfully decline to make payment in connection with same." In another letter which defendant wrote plaintiff prior to the suit, in answer to a letter in which plaintiff requested the return of the policy, defendant stated that the policy had been given to defendant by plaintiff to be cancelled. This letter was written January 23, 1931, long after the burglary. We are unable to understand on what theory defendant could contend that its policy was returned to defendant after the burglary for the purpose of cancellation, and no reason is stated by counsel for defendant in their brief. The defendant having denied liability under the policy, there was no necessity for plaintiff to make proof of loss. But as we have stated, proof of loss was actually made, so it is obvious that the contention is frivolous.

A further point is made by the defendant that plaintiff failed to prove that it kept books of account, as required by the policy, from which alone the loss could be proven. The evidence shows that plaintiff, the day it discovered the burglary, submitted to defendant's representatives cash register tapes showing the cash

plaintiff served notice on the defendant to produce the original proof of loss but it failed to do so. No complaint was made on the hearing that the testimony offered by plaintiff, as above quoted, was insufficient because it did not specifically set forth all of the facts known by the proofs of loss. Under these circumstances we think it obvious that there is no merit in the contention. The defendant had been given proofs of loss and failed and refused to produce them on the hearing. Plaintiff was then warranted in producing other evidence that proof of loss had been made. But no proofs of loss were produced because the defendant denied liability by notice to the suit. In a letter of August 1, 1930, defendant stated to plaintiff, "Our investigation of this alleged loss leads us to believe that it is one which is not covered under the terms of your policy. We must respectfully decline to make payment in accordance with same." In another letter which defendant wrote plaintiff prior to the suit, in answer to a letter in which plaintiff requested the return of the policy, defendant stated that the policy had been given to defendant by plaintiff to be cancelled. This letter was written January 22, 1931, long after the burglary. We are unable to understand on what theory defendant could contend that its policy was returned to defendant after the burglary for the purpose of cancellation, and no reason is stated by counsel for defendant in their brief. The defendant having denied liability under the policy, there was no necessity for plaintiff to make proof of loss. But as we have stated, proof of loss was actually made, so it is obvious that the contention is frivolous.

A further point is made by the defendant that plaintiff failed to prove that it kept books of account, as required by the policy, from which alone the loss could be proven. The evidence shows that plaintiff, the day it discovered the burglary, submitted to defendant's representatives such regular books showing the

taken in and which, the evidence tends to show, was put in the safe on Saturday evening before the burglary. These tapes were checked over by defendant's representative and taken away by him. They were afterward returned to plaintiff and apparently misplaced or destroyed by plaintiff. These tapes showed cash $4367.06, of which sum plaintiff found in its store on the morning of May 19th, $44.40, leaving a net cash loss of $4322.66.

A witness for plaintiff testified that the damage done to nearby merchandise when the safe was blown open was $50, which, added to the amount of cash makes the exact amount of the judgment, $4372.66. We think the fact that the cash was itemized on tapes in the cash register was competent to prove the loss. There is no evidence that plaintiff did not keep a proper and complete set of books. It is obvious that the damage done to the merchandise near the safe, when it was blown open, could properly be shown by a witness.

Defendant further contends that the court erred in giving instructions Nos. 1, 6, 3, and 4, because instructions 1 and 6 were substantially the same, and that 3 and 4 were substantially the same. No complaint is made to the instructions except on the ground that there was a repetition. Instructions 1 and 6 were to the effect that under the law plaintiff must prove every material allegation of its declaration by a preponderance of the evidence, and if the jury found that plaintiff had sustained this burden, their verdict should be for the plaintiff.

Instructions 3 and 4, while different in phraseology, were in substance that in case the jury found in favor of the plaintiff, they should, in determining the amount of the verdict, consider the amount of money in the safe; the damage done to the merchandise, and the damage done to the safe. No complaint is made to the substance of either of these instructions, and while it is obvious that an

instruction should not be repeated in substance, yet it is equally obvious that unless the defendant was prejudicially affected the verdict and judgment ought not be disturbed. There appears to be no defense in this case; none was interposed on the trial, and we think there is no defense urged here, so the giving of these instructions could not prejudicially affect the defendant.

Complaint is also made to the giving of instruction No. 5 at plaintiff's request. By that instruction the jury were told that if they found from the evidence that the defendant declined to make payment of loss on the ground that the loss was not covered by the policy, they should find that the plaintiff had substantially complied with the requirements of the policy in regard to furnishing proof of loss. The objection to this instruction is that no proof of loss was made. What we have above said is sufficient to show that this contention is wholly untenable. A further argument is that plaintiff must prove either that proof was made, as required by the policy, or that no proof was made, and that the court, by the instruction, undertook to tell the jury that if the defendant told the plaintiff it was declining to pay the loss on the ground that the loss was not covered by the policy, then the jury should find that plaintiff had substantially complied with the requirements of the policy in that regard, and that the evidence fails to show that the plaintiff made proof of loss. It is equally clear from what we have above stated, that there is no merit in this contention. Proofs of loss were made by plaintiff, but which it was not required to do because they had been waived by the defendant when it denied liability on the ground that the policy did not cover the loss.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

instruction should not be repeated in substance, yet it is equally obvious that unless the defendant was prejudicially affected the verdict and judgment ought not be disturbed. There appears to be no defense in this case; none was interposed on the trial, and we think there is no defense urged here, so the giving of these instructions could not prejudicially affect the defendant.

Complaint is also made to the giving of instruction No. 2 at plaintiff's request. By that instruction the jury were told that if they found from the evidence that the defendant declined to make payment of loss on the ground that the loss was not covered by the policy, they should find that the plaintiff had substantially complied with the requirements of the policy in regard to furnishing proof of loss. The objection to this instruction is that no proof of loss was made. What we have above said is sufficient to show that this contention is wholly untenable. A further argument is that plaintiff must prove without that proof was made, as required by the policy, or that no proof was made, and that the court, by the instruction, undertook to tell the jury that if the defendant said the plaintiff it was declining to pay the loss on the ground that the loss was not covered by the policy, then the jury should find that plaintiff had substantially complied with the requirements of the policy in that regard, and that the evidence fails to show that the plaintiff made proof of loss. It is equally clear from what we have above stated, that there is no merit in this contention. Proofs of loss were made by plaintiff, but which it was not required to do because they had been waived by the defendant when it denied liability on the ground that the policy did not cover the loss.

The judgment of the superior court of Cook county in affirmed.

AFFIRMED.

McCurdy, P. J., and Matchett, J., concur.

36275

48 7

CORA VAN DE VEER,
Appellee,

vs.

SOUTH SUBURBAN MOTOR COACH COMPANY, a Corporation,
Appellant.

APPEAL FROM CITY COURT OF CHICAGO HEIGHTS.

269 I.A. 647

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages claimed to have been sustained by her while a passengeron one of defendant's motor coaches, through the negligent operation of the coach by the driver of it. There was a jury trial and a verdict and judgment in plaintiff's favor for $5,000, and the defendant appeals.

The record discloses that between four and five o'clock on the evening of August 17, 1931, plaintiff boarded one of defendant's motor coaches at Momence, Illinois, for Chicago. She gave the ticket to the man in charge of the coach and started toward the rear of the coach to the only vacant seat, which was the last one. She says that as she was about to take her seat there was a crash, the coach gave a lurch, she was thrown, and her forehead struck the upper part of the coach. The evidence shows that plaintiff then sat down and came to Chicago; that she made no complaint to the driver of the coach until it reached its destination at Wabash and Twelfth streets, Chicago; that she then gave her name to the driver and told him she had been injured at Momence. Plaintiff's testimony is to the effect that after she received the bump on her forehead she became more or less blinded and nauseated and vomited a number of times on her way to the city.

A Mrs. Williams, called by plaintiff, testified that she was sitting in the rear seat of the coach in question; that the coach

DORA VAN DE VANN,
Appellee.

---Vs.

LOUIS GREENBAUM BOTTOM COACH
COMPANY, a corporation,
Appellant.

APPEAL FROM CITY COURT
OF WILLIAM DISTRICT.

260 I.A. 647

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages claimed to have been occasioned by her while a passenger upon one of defendant's motor coaches, through the negligent operation of the coach by the driver of it. There was a jury trial and a verdict and judgment in plaintiff's favor for $5,000, and the defendant appeals.

The record discloses that between four and five o'clock on the evening of August 27, 1923, plaintiff boarded one of defendant's motor coaches at Kenmore, Illinois, for Chicago. She gave the ticket to the man in charge of the coach and entered toward the rear of the coach to the only vacant seat, which was the last one. She had hardly had an one was about to take her seat there was a crash, the coach gave a lurch, she was thrown, and her forehead struck the upper part of the coach. The evidence says that plaintiff then sat down and came to Chicago; that she made no complaint to the driver of the coach until it reached its destination at Taylor and Peoria streets, Chicago; that she then gave her name to the driver and told him she had been injured at Kenmore. Plaintiff's testimony is to the effect that after she received the bump on her forehead she became more or less dizzied and nauseated and vomited a number of times on her way to the city.

A Mrs. Wiltsman, called by plaintiff, testified that she was sitting in the rear seat of the coach in question; that the coach

started with a jerk or lurch and plaintiff was thrown as plaintiff testified, and was injured. Mrs. Williams further testified that plaintiff was nauseated coming in to Chicago.

The driver of the coach gave testimony to the effect that he was an experienced driver; that he did not start his car with a lurch or jerk at Momence, and that it was impossible to do so on account of the mechanism of the coach. He further testified that there was a mirror in front of him in the coach where he could see all of the passengers in the coach and that at no time did he see anything out of the ordinary during the northbound trip from Momence to Lincoln Fields, where the drivers of two coaches changed, the driver of the car in question there taking a southbound coach and the driver from that southbound coach bringing the coach in question to Chicago. The second driver of the coach from Lincoln Fields to Chicago also testified as to the location of the mirror in the front of the coach, and that he saw nothing out of the ordinary during the trip; that the first intimation he had that anything wrong was claimed to have occurred was when plaintiff told him at Twelfth and Wabash that she had been injured.

Plaintiff's evidence is further to the effect that when she arrived in Chicago she went to her sister's on the West Side and a doctor was called, who ordered the application of ice packs; that the next day she was taken in an automobile, an improvised bed being made in the back seat, to her home at Momence, where a doctor was called who treated her; that a day or two thereafter she was taken to a hospital at Kankakee and turned over to a Dr. Wilson; that X-ray pictures were there taken of her; that she remained for two or three days and then returned to her home at Momence. The X-ray pictures were offered in evidence but they are not in the record. The doctor who treated plaintiff at Momence testified as to plaintiff's condition and what he did professionally

started with a jerk or lurch and plaintiff was thrown on plaintiff testified, and was injured. Mrs. Williams further testified that plaintiff was manoeuvered coming in to Chicago.

The driver of the coach gave testimony to the effect that he was an experienced driver; that he did not start his car with a lurch or jerk at Kewanee, and that it was impossible to do so on account of the mechanism of the coach. He further testified that there was a mirror in front of him in the coach where he could see all of the passengers in the coach and that at no time did he see anything out of the ordinary during the northbound trip from Kewanee to Lincoln Fields, where the drivers of two coaches changed, the driver of the car in question there taking a northbound coach and the driver from that northbound coach bringing the coach in question to Chicago. The second driver of the coach from Lincoln Fields to Chicago also testified as to the location of the mirror in the front of the coach, and that he saw nothing out of the ordinary during the trip; that the first intimation he had that anything wrong was claimed to have occurred was when plaintiff told him at Twelfth and Wabash that she had been injured.

Plaintiff's evidence is further to the effect that when she arrived in Chicago she went to her sister's on the West Side and a doctor was called, who ordered the application of ice packs; that the next day she was taken in an automobile, an improvised bed being made in the back seat, to her home at Kewanee, where a doctor was called who treated her; that a day or two thereafter she was taken to a hospital at Kankakee and turned over to a Dr. Wilson; that X-ray pictures were there taken of her; that she remained for two or three days and then returned to her home at Kewanee. The X-ray pictures were offered in evidence but they are not in the record. The doctor who treated plaintiff at Kewanee testified as to plaintiff's condition and what he did professionally

for her. This was to the effect that he had treated her almost continuously up to the time of the trial, which was begun March 21, 1932.

Doctors were called to read the X-ray pictures. The testimony of those called by plaintiff was to the effect that the pictures showed a fracture of the left parietal bone and also the second cervical vertebra; while those called by defendant testified that the pictures showed no fracture at all.

There is further evidence in the record to the effect that plaintiff was not laid up all the time from August 17th, the date of the accident, but that she had driven automobiles at Villa Park and in Danville - evidence to the effect that her injuries were not at all as severe as she claimed. There is further evidence that would seem to indicate that she was rather severely injured. There is other evidence in the record to which we have not adverted because we have reached the conclusion that there should be a new trial in the case. The evidence on the question of liability of the defendant is sharply in conflict; and the evidence as to plaintiff's injuries renders the extent of them not at all certain.

Complaint is made that the court erred in admitting the X-ray pictures in evidence. In the instant case no fluoroscope was used nor was any necessary. What the law requires to be shown before an X-ray is admissible is concisely stated in People v. Williams, 337 Ill. 371, where it is said that it must appear from the evidence (p. 376) "that the witness is skilled in the use of the X-ray machine, and that he took the picture concerning which he testifies and is able to say that the picture is accurate." Of course, if it is taken under his direction, or if these facts are otherwise made to appear, the requirement of the rule is met. Stevens v. Ill. Cent. R. R., 306 Ill. 370. In that case, after enumerating some of the evidence required before such pictures

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are admissible, the court said (p. 376): "These methods of establishing the accuracy of the picture are not exclusive, but whatever method is used, its accuracy must be established before it is admitted." Since the rule is clear, we think there will be no difficulty on the retrial in this respect.

A further complaint is made that the court erred in giving plaintiff's instruction No. 1. That instruction defined the duty of the defendant as a common carrier and we think the complaint made is untenable. Complaint is also made to the giving of plaintiff's instruction No. 13. By this instruction the jury were told that the plaintiff was required to use only such care and caution for her own safety as a reasonably prudent person would exercise under similar circumstances, etc., and that she was not required to exercise extraordinary care or diligence. We think this instruction stated the law accurately. A further complaint is made that the court erred in refusing an instruction offered by defendant by which it sought to have the jury told that if they believed from a preponderance of the evidence that the driver of the bus possessed ordinary and reasonable skill commensurate with the business in which he was engaged, and that at and prior to the time in question "he exercised such judgment and skill of a reasonable, careful and prudent driver in conveying passengers for hire and that at and just prior to the time of the injury complained of that he exercised such judgment and skill in driving the motor bus, then and in that case you should find the defendant not guilty." We think there is no error in refusing this instruction. It was apt to mislead the jury. The jury might believe that the driver was only required to exercise ordinary care, but the law is that he must exercise the highest degree of care commensurate with the practical operation of the bus.

are admirable, the court said (p. 276): "These methods of establishing the accuracy of the picture are not exclusive, but whatever method is used, its accuracy must be established before it is admitted." Since the rule is clear, we think there will be no difficulty on the retrial in this respect.

A further complaint is made that the court erred in giving plaintiff's instruction No. 1. That instruction defines the duty of the defendant as a common carrier and we think the complaint made is untenable. Complaint is also made to the giving of plaintiff's instruction No. 18. By this instruction the jury were told that the plaintiff was required to use only such care and caution for her own safety as a reasonably prudent person would exercise under similar circumstances, etc., and that she was not required to exercise extraordinary care or diligence. We think this instruction stated the law accurately. A further complaint is made that the court erred in refusing an instruction offered by defendant in which it sought to have the jury told that if they believed from a preponderance of the evidence that the driver of the bus possessed ordinary and reasonable skill commensurate with the vehicles in which he was engaged, and that at and prior to the time in question "he exercised such judgment and skill of a reasonable, careful and prudent driver in conducting passengers for hire and that at and just prior to the time of the injury complained of that he exercised such judgment and skill in driving the motor bus, then and in that case you should find the defendant not guilty." We think there is no error in refusing this instruction. It was not to mislead the jury. The jury might believe that the driver was only required to exercise ordinary care, but the law is that he must exercise the highest degree of care commensurate with the practical operation of the bus.

Complaint is also made that during the trial the court repeatedly examined witnesses at considerable length, and a special complaint, in this respect, is made in regard to the examination of Dr. Rankin, who testified as an expert in the reading of X-ray pictures. While the learned trial Judge is a man of ability and experience, we think there is merit in the objection made. The record discloses that both parties were represented by able counsel and therefore the action of the court was unnecessary and prejudicial to the defendant. Of course there are cases where the court has the right to ask questions and should do so; but we think the case before us is not of that character, because counsel by their questions had developed the facts. Dr. Rankin, called by the defendant, was the last witness. He gave testimony indicating that he was able to read X-ray pictures, and his testimony is to the effect that the pictures did not reveal any fracture of the skull or cervical vertebra. He was cross-examined at considerable length by counsel for the defendant, and the cross-examination completed. The court then interrogated him and the questions and answers cover about six pages of the abstract. Without going into these questions and answers in detail, we think it sufficient to say that while the court intended to be eminently fair, yet many of the answers elicited on this examination were to the effect that a great many of the injuries claimed to have been sustained by plaintiff might or could have been caused as plaintiff's evidence tended to show. As a result of these questions, the jury might have taken plaintiff's version in view of the fact that the examination had been conducted by the court.

For the reasons stated the judgment of the City Court of Chicago Heights is reversed and the cause is remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

Complaint is also made that during the trial the court
improperly excluded witnesses on cross-examination, and a typewritten
complaint, in this respect, is made in regard to the examination
of Dr. Bunkin, who testified as an expert in the reading of X-ray
pictures. While the learned trial Judge is a man of ability and
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tended to show. As a result of these questions, the jury might have
taken plaintiff's version in view of the fact that the examination
had been conducted by the court.

For the reasons stated the judgment of the City Court of
Cohoes Judgment is reversed and the order is reversed.

EDWARDS AND MERRIAM.

Moderly, P. J., and Matteson, J., concur.

36228

MARIE WARD,
Appellant,

vs.

DONALD SHELEY, Administrator of the Estate of Emma Fassett, Deceased,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

4077

269 I.A. 646

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Emma Fassett died at Chicago, Illinois, September 14, 1931. The claimant, Marie Ward, who had for several years prior to the death of Mrs. Fassett roomed and boarded in the home of Mrs. Fassett, filed in the Probate court a claim against the estate in the sum of $10,000. She averred that "the claimant hereinagreed to live with Mrs. Emma Fassett, deceased, as a companion and permanent attendant, beginning in February, 1926, and did live with the said Mrs. Emma Fassett until her decease. As a consideration for this the deceased promised to will the said Marie Ward, Ten Thousand dollars $10,000 upon the death of the deceased."

The Probate court heard the evidence and entered an order disallowing the claim. The claimant appealed to the Circuit court, where upon a trial de novo evidence was heard and again the claim was disallowed. The claimant prosecutes this further appeal to this court.

The record presents only one question for our consideration, namely, whether the findings and the judgment of the Circuit court are so clearly and manifestly against the evidence that it is the duty of this court to set the same aside. In a consideration of that question we may not disregard the fact that two Judges of nisi prius courts, who saw and heard the witnesses, have found in favor of the estate. A perusal of the record compels on our part the same conclusion.

STATE

MARIE WARD,

Appellant,

vs.

EDWARD DUNLEY, Administrator of the Estate of Emma Tarbell, Deceased,

Appellee.

APPEAL FROM CIRCUIT COURT

OF CLARK COUNTY.

MR. JUSTICE ANDREWS DELIVERED THE OPINION OF THE COURT.

Emma Tarbell died on Monday, Illinois, September 12, 1910. The claimant, Marie Ward, who had for several years prior to the death of Mrs. Tarbell resided and resided in the home of Mrs. Tarbell, filed in the Probate court a claim against the estate in the sum of $10,000. She averred that "the claimant Tarbell-deceased in life with Mrs. Emma Tarbell, deceased, as a companion and paramour attendant, beginning in February, 1908, and did live with the said Mrs. Emma Tarbell until her death. As a consideration for this the deceased promised to will the said Marie Ward, her Thousand Dollars $10,000 upon the death of the deceased."

The Probate court heard the evidence and entered an order disallowing the claim. The claimant appealed to the Circuit court, where upon a trial de novo evidence was heard and again the claim was disallowed. The claimant prosecutes this further appeal to this court.

The record presents only one question for our consideration, namely, whether the finding and the judgment of the Circuit court are so clearly and manifestly against the evidence that it is the duty of this court to set the same aside. In a consideration of that question we may not disregard the fact that two judges of this court, who saw and heard the witnesses, have found in favor of the estate. A perusal of the record convinces us our part the more reasonable.

The burden of proof is upon the claimant. She was disqualified as a witness and relied upon the testimony of witnesses produced by her as to alleged oral admissions made by the deceased. Evidence of this kind is always carefully scrutinized, and particularly is this so where the estate of a deceased person is involved.

The claimant produced several witnesses who testified to alleged oral admissionsof the deceased which vary little in phraseology. The evidence is undisputed that the claimant lived at the home of Mrs. Fassett for several years prior to her death, and there is written evidence in the form of postal cards and letters which indicates that a genuine friendship existed between them. The evidence further tends to show, however, that the claimant while residing at the home of Mrs. Fassett paid her six dollars a week for her room and board, which is somewhat inconsistent with an intention on the part of Mrs. Fassett to turn over her entire estate to the claimant.

The principal witness for claimant was another roomer at the home of the deceased, one F. J. Speakman. He says that he first met claimant on May 1, 1930, the day upon which he went to room in the home of Mrs. Fassett. He says that Mrs. Fassett requested him to take a room in her home to help pay her expenses and that at that time Mrs. Fassett said, "that she had promised Marie Ward $10,000 and it was getting to the point where she would have to use that $10,000 unless she took in roomers."

A few days prior to her death Mrs. Fassett while suffering from pneumonia was taken to the Oak Park hospital. Speakman says that the Friday before she died (she died on Monday) when no one was present except himself, Mrs. Fassett asked him for a pencil and a piece of paper, and that when he asked her what she wanted it for, she replied, "Never mind, give it to me." He says that he then tore the flap off an envelope and gave her a pencil; that she then

The burden of proof is upon the claimant. She was disqualified as a witness and relied upon the testimony of witnesses produced by her to illegal oral declarations made by the decedent. Evidence of this kind is always carefully scrutinized, and particularly is this so where the estate of a deceased person is involved.

The claimant produced several witnesses who testified to alleged oral declarations by decedent which very little is strongly. The evidence is undisputed that the claimant lived at the home of Mrs. Fassett for several years prior to her death, and there is written evidence in the form of postal cards and letters which indicates that a complete friendship existed between them. The evidence tends to show, however, that the claimant paid for building at the home of Mrs. Fassett and paid her the delivery a year for her room and board, which is somewhat inconsistent with an intention on the part of Mrs. Fassett to turn over her entire estate to the claimant.

The principal witness for claimant was another tenant at the home of the deceased, one F. J. Spencer. He says that he first met claimant on Jan 1, 1930, the day she came which he was to room in the house of Mrs. Fassett. He says that Mrs. Fassett expressed her intention to make a trade in her home to help pay her expenses and that at that time Mrs. Fassett said, "that she had overdrawn Uncle Ward $10,000 and it was getting to the point where she would have to use that $50,000 unless she took in roomers."

A few days prior to her death Mrs. Fassett while suffering from pneumonia was taken to the Cox Park Hospital. Spencer says that the Friday before she died (she died on Sunday) when he was present except himself, Mrs. Fassett asked him for a pencil and a piece of paper, and that when he asked her what she wanted it for, she replied, "Never mind, give it to me." He says that he then put the flap of an envelope and gave her a pencil; that she then

signed her name on the paper and said, "You take that and fill it in and draw that money out of the bank and give it to Marie Ward. That is what I promised her." He says that at that time she gave him three deposit books. The paper is in evidence. With the exception of the identification marks it contains only the name of Mrs. Emma Fassett written in an irregular hand with a pencil.

Mrs. Katherine Flicker, in behalf of claimant, testified that she visited in Mrs. Fassett's home one evening during the summer of 1926 and stayed there all night; that she was then introduced to Miss Ward and that Miss Ward, Mrs. Fassett and the witness occupied the same bedroom; that the husband of the witness and Speakman slept on a davenport bed that night in the living room. Mrs. Flicker says that at that time she had a conversation with Mrs. Fassett after Miss Ward had retired. She says that Mrs. Fassett said that she didn't know what she would do without Miss Ward's help; that she had been a good friend and had done so much for her she didn't know what she would do if she didn't stay with her. The witness further says, "And she also said she had told Marie she would give her $10,000 at the time of her death if she would stay with her until that time."

The husband of this witness, Walter A. Flicker, testified that he was at Mrs. Fassett's home with his wife that evening; that when Marie Ward was out of the room Mrs. Fassett talked with Mrs. Flicker and told her that since her husband died Miss Ward had been a companion "and that she was going to give her $10,000 at the time of her death if she would stay with her as a companion until that time."

Mrs. Catherine Abrham testified that in November, 1927, she visited with Mrs. Fassett; that Mrs. Fassett told her she did not know what she would do without Miss Ward, that she had been a regular companion to her; that on December 24, 1927, she had another

signed her name on the paper and said, "Ten June 1944 and 7141 is in and Grace that money out of the bank and give it to Marie Ford. That is what I promised her." He says that at that time she gave him three deposit books. The paper is in evidence. With the exception of the identification marks it contains only the name of Mrs. Hope Bennett written in an hand-hand with a pencil.

Mrs. Katherine Fisher, in behalf of claimant, testified that she visited in Mrs. Bennett's home one evening during the summer of 1942 and stayed there all night; that she was then introduced to Miss Ford and that Miss Ford, Mrs. Bennett and the witness participated the same bedroom; that the husband of the witness and Bennett slept on a davenport bed that night in the living room. Mrs. Fisher says that at that time she had a conversation with Mrs. Bennett after Miss Ford had retired. She says that Mrs. Bennett said that she didn't know what she would do without Miss Ford's help; that she had been a good friend and had done so much for her she didn't know what she would do if she didn't stay with her. The witness further says, "And she said she had told Marie she would give her $20,000 at the time of her death if she would stay with her until that time."

The husband of this witness, Walter A. Fisher, testified that he met Mrs. Bennett's home with his wife that evening; that when Marie Ford was out of the room Mrs. Bennett talked with Mrs. Fisher and said her that since her husband died Miss Ford had been a companion "and that she was going to give her $20,000 at the time of her death if she would stay with her as a companion until that time."

Mrs. Katherine Fisher testified that in November, 1947, she visited with Mrs. Bennett; that Mrs. Bennett told her she did not know what she would do without Miss Ford, that she had been a regular companion to her; that on December 24, 1947, she had another

conversation with Mrs. Fassett in which Mrs. Fassett said that she did not know what she would do without Maria, that she was all she had in the world and was the only one who had stood by her, and that "if Miss Ward stood by her until she passed away that she had promised to give her ten thousand dollars."

This evidence comes far short of proving a bilateral contract between claimant and Mrs. Fassett. No one of the witnesses says that the claimant at any time agreed that she would stay with Mrs. Fassett or that she would perform services which are averred in the statement of claim. Assuming the truth of these conversations, the supposed agreement between the parties is so vague and indefinite that it would be difficult indeed for a court to base a finding and judgment thereon. The evidence upon the whole seems quite improbable, and there is the affirmative evidence of several witnesses who testified to oral conversations with Mrs. Fassett in which she talked about her property and its disposition and expressed an intention contrary to that for which claimant contends.

As is usual in cases of this character, much of the evidence on both sides is uncertain and unreliable. It appears that after the death of Mrs. Fassett the administrator went to her former home and found the witness Speakman there, and that the administrator obtained entrance only with difficulty; that when he did get in Speakman claimed everything there as his own property and represented himself to be one James Stillman. A memorandum of the property was made at that time, and Speakman when requested to sign wrote his name "James Stillman." There is evidence also to the effect that years before he was known under the name of "Flicker."

If claimant should prevail the effect would be to produce a distribution of property different from that provided by law. Practically all the evidence here rests on parol, and the courts regard evidence of this kind with great jealousy and weigh it in

conversation with Ara. Barsett in which Ara, Barsett said that she did not know what she would do without Maria, that she was all she had in the world and was the only one who had stood by her, and that "if Ara were stood by her until she passed away that she had promised to give her ten thousand dollars."

This evidence seems far short of proving a bilateral contract between claimant and Ara. Barsett. No one of the witnesses says that the claimant at any time stated that she would pay Ara, Barsett or that she would perform services which are asserted to be consideration of claim. Regarding the truth of these assertions, the supposed agreement between the parties is so vague and indefinite that it would be difficult indeed for a court to base a finding and judgment thereon. The evidence upon the whole seems quite improbable, and there is the affirmative evidence of several witnesses who testified to oral conversations with Ara. Barsett in which she talked about her property and its disposition and expressed an intention contrary to that for which claimant contends.

As is usual in cases of this character, much of the evidence on both sides is uncertain and unreliable. It appears that after the death of Ara. Barsett the administrator went to her former home and found the alleged promissory note, and that the administrator obtained entrance only with difficulty; that when he did get in Spearman claimed everything there as his own property and represented himself to be the James Gilliam. A memorandum of the property was made at that time, and Spearman then requested to sign where his name "James Gilliam." There is evidence also to the effect that years before he was known under the name of "Tilghter."

If claimant should prevail the effect would be to produce a distribution of property different from that provided by law. Practically all the evidence here rests on paper, and the source regard evidence of this kind with great jealousy and weigh it in

a most scrupulous manner. Wallace v. Hapgleys, 103 Ill. 299, and Woods v. Evans, 113 Ill. 191, are only two of numerous cases which might be cited.

We would not be justified in reversing the judgment of the trial court. On the contrary, the uncertain character of this evidence would have compelled the reversal of a judgment for claimant if it had been entered.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

a most extraordinary manner. *Gilmore v. Gardner*, xxi (1). 234; and *Davis v. Stone*, xix (1). 181, are only two of numerous cases which might be cited.

It would not be justified in overruling the judgment of the trial court. On the contrary, the evidence convinces of this evidence could have convinced the tribunal of a judgment the element of it had been wrong.

The judgment is affirmed.

AFFIRMED.

Mr. J. J. Jones, for plaintiff, in error.

36240

SIGMUND WOOLNER for the use of
WEST SIDE TRUST & SAVINGS BANK,
a Corporation,
Defendant in Error,

vs.

SIG WOOLNER CO., a Corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

269 I.A. 646²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The West Side Trust & Savings Bank became a judgment creditor of Sigmund Woolner and Charles K. Woolner in the sum of $3253.32. After execution was returned unsatisfied, it caused a summons to be issued against defendant, Sig Woolner Co., Inc., a corporation, as garnishee. The garnishee answered that there was nothing due and that it had nothing in its possession belonging to the judgment debtors. The garnishor contested the answer, and the court after hearing the evidence found for the garnishor and entered judgment against the garnishee for the sum of $3,000.

The garnishee has appealed contending that it is not liable, while the garnishor argues that the garnishee is liable on the theory that it purchased the entire business conducted by one of the judgment debtors without compliance with the Bulk Sales Law. Smith-Hurd's Ill. Rev. Stats. 1931, chap. 121½, sec. 78, p. 2582.

The decisions of the Appellate court of this district are to the effect that a vendee who has failed to comply with the provisions of that law may be held liable to the creditor in a garnishment proceeding. Cohn v. Malo, 198 Ill. App. 538; Superior Plating Works v. Art Metal Crafts Co., 213 Ill. App. 621; Ressler v. Seeman, 233 Ill. App. 305; Crane v. Ill. Merchants Trust Co., 238 Ill. App. 257.

The facts as disclosed by the evidence seem to be that one of the judgment debtors, Sigmund Woolner, was engaged in the busi-

SEPAC

GILBURD WOLLMAN for the use of
WEST SIDE TRUST & SAVINGS BANK,
a Corporation,
Defendant in Error,

vs.

SIG WOLLMAN et., a Corporation,
PLAINTIFF IN ERROR.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

Mr. JUSTICE MCBRIDE DELIVERED THE OPINION OF THE COURT.

The West Side Trust & Savings Bank became a judgment creditor of Sigmund Wollman and Charles L. Wollman in the sum of $3888.88. After execution was returned unsatisfied, it issued a summons to be issued against defendant, Sig Wollman Co., Inc., a corporation, as garnishee. The garnishee answered that there was nothing due and that it had nothing in its possession belonging to the judgment debtor. The garnishee substantiated the answer, and the court after hearing the evidence found for the garnishee and entered judgment against the garnishee for the sum of $3,000.

The garnishee has argued contention that it is not liable while the garnishee argues that the garnishee is liable on the theory that it purchased the entire business conducted by one of the judgment debtors without compliance with the Bulk Sales Law. Smith-Hurd's Ill. Ann. Stats. 1933, Chap. 121, sec. 7, p. 2340.

The decisions of the appellate courts of this district are to the effect that a vendee who has failed to comply with the provisions of that law may be held liable as the creditor in a garnishment proceeding. Cohen v. Zeik, 329 Ill. App. 334; Imperial Clothing Works v. Art Metal Craftsmen Co., 329 Ill. App. 691; Bagley v. Jensen, 328 Ill. App. 89; Cohen v. Ill. Automobile Sales Co., 328 Ill. App. 397.

The facts as disclosed by the evidence were as follows: Some of the judgment debtors, Sigmund Wollman, was employed in the bul-

ness of selling meat which he had conducted for more than thirty years. He was accustomed to buy and sell the meat in his own name. His wife, Martha Woolner, signed checks, kept books and answered the telephone. In conducting this business the judgment debtor used two trucks and an automobile. One truck was a two-and-a-half-ton Diamond T, and the other a two-ton White. The automobile was a 1929 Nash. Martha Woolner, according to evidence which is not disputed, furnished the money with which these trucks and automobiles were originally bought. The vehicles and the licenses for them, however, were purchased in the name of Sigmund Woolner and his name was painted upon the sides of the trucks. This property, together with a list of customers with whom business was transacted, constituted the entire assets of the business conducted by Sigmund Woolner at the time of the incorporation of the Sig Woolner Co., the garnishee.

All the merchandise used in the business was purchased in the name of Sigmund Woolner and was used under his name. The checks given in payment for merchandise were signed by Martha Woolner, but it is not contended that she owned any interest in the business, and her only duties in the conduct of it were to sign checks, to answer the telephone and to keep the books.

Upon the incorporation of the Sig Woolner Co., a bill of sale was executed by Martha Woolner transferring the two trucks and the automobile to the corporation. It appears that this bill of sale was executed May 2, 1931. An examination of the record discloses that the note upon which judgment was entered was executed August 15, 1931. It was signed by Sigmund Woolner and Charles K. Woolner. The name of Martha Woolner does not appear thereon. It therefore affirmatively appears from the record that the judgment creditor was not a creditor of Martha Woolner at all at the time of

meat of selling meat which he had conducted for more than twenty years. He was accustomed to buy and sell the meat in his own name. His wife, Martha Woolner, signed checks, kept books and answered the telephone. In conducting this business the judgment debtor used two trucks and an automobile. One truck was a two-and-a-half-ton Diamond T, and the other a two-ton White. The automobile was a 1929 Ford. Martha Woolner, according to evidence which is not disputed, financed the money with which these trucks and automobiles were originally bought. The vehicles and the licenses for them, however, were purchased in the name of Sigmund Woolner and his name was painted upon the sides of the trucks. This property, together with a list of customers with whom business was transacted, constituted the entire assets of the business conducted by Sigmund Woolner at the time of the incorporation of the Sig Woolner Co., the plaintiff herein.

All the merchandise used in the business was purchased in the name of Sigmund Woolner and was used under his name. The checks given in payment for merchandise were signed by Martha Woolner, but it is not contended that she owned any interest in the business, and her only duties in the conduct of it were to sign checks, to answer the telephone and to keep the books.

Upon the incorporation of the Sig Woolner Co., a bill of sale was executed by Martha Woolner transferring the two trucks and the automobile to the corporation. It appears that this bill of sale was executed May 2, 1931. An examination of the record disclosed that the note upon which judgment was entered was executed August 13, 1931. It was signed by Sigmund Woolner and Charles K. Woolner. The name of Martha Woolner does not appear thereon. It therefore affirmatively appears from the record that the judgment creditor was not a creditor of Martha Woolner at all at the time of

the alleged sale. Further, there is no evidence that Sigmund Woolner, the judgment debtor, made any sale of the property. The sale was made by his wife, Martha Woolner, who does not appear to be indebted in any way. The Bulk Sales act has no application under such circumstances. It concerns only those who are creditors at the time the alleged sale takes place. There is no evidence in this record that the garnishor was a creditor of the vendor on May 2, 1931. The judgment in his favor must therefore be reversed.

REVERSED.

McSurely, P. J., and O'Connor, J., concur.

the alleged sale. Further, there is no evidence that Gordon Vautier, the judgment debtor, made any sale of the property. The sale was made by his wife, Martha Vautier, who does not appear to be interested in any way. The mere sale was made on application under such circumstances. It concerns only those who are involved at the time the alleged sale takes place. There is no evidence in this record that the purchaser was a creditor of the vendor in any fashion. The judgment in his favor must therefore be reversed.

REVERSED.

Mahoney, P. J., and O'Connor, J., concur.

36249

42 A

LOUIS SILVER,
Appellant,

vs.

DAVID SIDRANSKY, LILLIAN SIDRANSKY,
JENNIE LINN and MORRIS LINN,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

269 I.A. 646[3]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On February 26, 1932, plaintiff caused a judgment by confession in the sum of $355.51 to be entered against David Sidransky, Lillian Sidransky, Jennie Linn and Morris Linn. Upon petition of the Sidranskys the judgment was afterward opened up, the order providing that the petition should stand as an affidavit of merits and the judgment as security.

When the cause came on for trial plaintiff offered the notes, upon which judgment was confessed, in evidence. An examination of the same discloses that the makers thereof were David Sidransky, Lillian Sidransky, Jennie Lewin and Morris Lewin. Defendants objected to the admission of these notes on the ground that there was a variance, and the court sustained the objection, pointing out the material variance between the notes described in the pleading and these notes which were offered in evidence. Plaintiff failing to offer further evidence, the court made a finding in favor of defendants and entered judgment thereon in their favor, which plaintiff seeks to reverse by this appeal.

Plaintiff has cited a number of cases holding that where a defendant has been let in to plead after judgment of confession, the burden of proof remains upon plaintiff to prove his case. Morris v. Taylor, 199 Ill. App. 548; Cohen v. Rosenthal, 207 Ill. App. 586; Morrison Hotel Co. v. Kirsner, 245 Ill. 431. We understand such to be the rule of law applicable.

LEWIS BRAWNER,
Appellant,

vs.

FLYNN BIGHAMMY, LILLIAN BIGHAMMY,
Monte Lime and Morris Lime,
Appellees.

APPEAL FROM MONTEREY.
COURT OF APPEALS.

MR. JUSTICE MATHERLY DELIVERED THE OPINION OF THE COURT.

On February 24, 1933, plaintiff secured a judgment of condemnation in the sum of $888.81 to be entered against David Bighammy, Lillian Bighammy, Monte Lime and Morris Lime. Upon petition of the defendants the judgment was afterward opened up, the order providing that the petition should stand as an affidavit of merits and the judgment as security.

When the cause came on for trial plaintiff offered the notes, upon which judgment was confessed, in evidence. An examination of the same disclosed that the makers thereof were David Bighammy, Lillian Bighammy, Monte Lime and Morris Lime. Defendants objected to the admission of these notes on the ground that there was a variance, and the court sustained the objection, holding out the material variance between the notes described in the pleading and these notes which were offered in evidence. Plaintiff failing to offer further evidence, the court made a finding in favor of defendants and entered judgment thereon in their favor, which plaintiff seeks to reverse by this appeal.

Plaintiff has cited a number of cases holding that where a mistake has been had in the plea after judgment of confession, the burden of proof devolves upon plaintiff in error his case. Bertie v. Turner, 108 Ill. App. 648; Cohen v. Greenfield, 104 Ill. App. 288; Eastern Rail Co. v. Hanner, 248 Ill. 621. We understand such to be the rule of law applicable.

Plaintiff also urges other propositions and cites authorities to the effect that a party who executes a note for value is estopped from denying its validity; that part payment of a note by the person in whose name it purports to be made is prima facie proof of its execution; that evidence of a defense not set up in the affidavit of merits should not be received; that the burden is on defendants to prove the affirmative defenses interposed by them by a preponderance of the evidence; that defendants by seeking and obtaining leave to plead to the merits waived all technical objections to the judgment entered by confession.

Concerning these propositions there is no doubt, but they do not reach the vital question which is before this courton this appeal, namely, whether the court erred in sustaining the objection of defendants to the notes as offered. That is the real question to be considered here. The brief of plaintiff does not discuss the question, and defendants have not filed any brief. That there was a material variance between the instruments set up in the statement of claim and those offered in evidence, there can be no doubt. Jennie Linn is not idem sonans with Jennie Lewin, and Morris Linn is not idem sonans with Morris Lewin. Presumptively, Jennie Linn and Morris Linn are not the same persons as Jennie Lewin and Morris Lewin, and the notes offered were not obligations such as were described in the statement of claim.

The question presented to the court is not whether the defense of non-execution and non-delivery of the notes may be interposed in the absence of a verified plea in bar, but is whether notes which are not the same as those described in the pleadings are admissible in evidence. That they are not admissible, see Griffith v. Furry, 3[illegible] Ill. 251, and Kehr v. Kehr, 203 Ill. App. 584. Irrespective of the statute, we think a defendant is entitled to have the proofs offered correspond to the names of the persons against whom the action

Finally, we agree with propositions and also without-

also to the effect that a party who executes a note for value is estopped from denying its validity; that part payment of a note by the person in whose name it purports to be made is prima facie proof of its execution; that evidence of a defense not set up in the affidavit of merits should not be received; that the burden is on defendants to prove the affirmative defenses interposed by them by a preponderance of the evidence; that defendants by pleading and obtaining leave to plead to the merits waived all technical objections to the judgment entered by default.

Concerning these propositions there is no doubt, but they do not reach the vital question which is before this court on this appeal, namely, whether the court erred in sustaining the objection of defendants to the notes as offered. That is the real question to be considered here. The fact of plaintiff does not discuss the question, and defendants have not cited any brief. Just there was a material variance between the instruments set up in the statement of claim and those offered in evidence, there can be no doubt. Jennie Klein is not Klein running with Jennie Levin, and Morris Klein is not Klein running with Morris Levin. Presumably, Jennie Klein and Morris Klein are not the same persons as Jennie Levin and Morris Levin, and the notes offered were not obligations such as were described in the statement of claim.

The question presented to the court is not whether the defense of non-execution and non-delivery of the notes may be interposed in the absence of a verified plea in bar, but is whether notes which are not the same as those described in the pleadings are admissible in evidence. That they are not admissible, see PRATTEN v. PATTY, 30 Ill. 271, and Kahn v. Kahn, 302 Ill. App. 294. Irrespective of the statute, we think a defendant is entitled to have the proofs offered materialized to the names of the persons against whom the action

is brought. A proper amendment of the statement of claim would have made these offered notes admissible, and plaintiff should have asked leave of the court to make such amendment.

We assume this suit will not be a bar to another wherein the makers of the notes are sued in the names under which the notes were executed.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

in brought. A proper movement of the statement of claim would have made those different order additions, and clearly it would have asked leave of the court to make such amendment.

To assume this will will not be a bar to amending civil the pleadings of the notice was made in the manner under which the notice were amended.

The has previous indicated the judgment is affirmed.

APPEARS.

Mahoney, J. Z., and O'Connor, J., member.

36259

In Re Appeal of CHICAGO TITLE AND TRUST COMPANY, a Corporation, Complainant, from Order entered on Intervening Petition of UPTOWN STATE BANK and Answers thereto.

CHICAGO TITLE AND TRUST COMPANY, a Corporation,
Appellant,

vs.

ARNOLD APARTMENTS BUILDING CORPORATION, a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

269 I.A. 646

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal concerns a controversy arising on the intervening petition of the Uptown State Bank to determine the rights of the complainant trustee to the sum of $2532.82, which the Uptown bank received from its predecessor, the Fidelity Trust & Savings Bank, with which it was deposited by the Arnold Apartments Building Corporation. The Building corporation now demands the same against the claim of the Chicago Title & Trust Co., trustee, for certain owners of bonds.

The parties by their answer set up their respective claims, and the chancellor after hearing the evidence entered an order awarding the fund to the Building corporation. The Trust company prosecutes this appeal.

The facts in time sequence appear to be that January 25, 1926, Harry Yavitch and Evelyn Yavitch, his wife, owners of certain real estate in Cook county, conveyed the same in trust to the Chicago Title & Trust Co. as trustee to secure the payment of 280 bonds amounting to the aggregate sum of $135,000. The bonds by their terms matured upon different dates and drew interest at the rate of 6½% per annum, payable at the Fidelity Trust & Savings Bank. The conveyance included rents, issues and profits and con-

BANKS

In Re Appeal of MIDWAY TITLE AND TRUST COMPANY, a Corporation, Complainant, from Order entered on Interveening Petition of UNION STATE BANK and Amerra Interes.

MIDWAY TITLE AND TRUST COMPANY,
a Corporation,
Appellant,

vs.

AMERICAN LIMESTONE BUILDING CORPORATION,
a Corporation,
Appellee.

ATTAR, TRUE MEMBERS
DENNY, BOOK COUNTY.

MR. JUSTICE MACKNETT DELIVERED THE OPINION OF THE COURT.

This appeal concerns a controversy arising on the intervening petition of the Union State Bank to determine the rights of the complainant trustee in the sum of $8888.88, which the Union Bank received from its predecessor, the Fidelity Trust & Savings Bank, with which it was deposited by the Arnold Apartments Building Corporation. The Building corporation now demands the same against the claim of the Chicago Title & Trust Co., trustee, for certain arrears of bonds.

The parties by their answer set up their respective claims, and the chancellor after hearing the evidence entered an order awarding the fund to the Building corporation. The Trust company prosecutes this appeal.

The facts in this response appear to be that January 28, 1926, Larry Dexter was Joseph Twelve, his wife, owners of certain real estate in Cook county, conveyed the same in trust to the Chicago Title & Trust Co. as trustee to secure the payment of 252 bonds amounting to the aggregate sum of $125,000. The bonds by their terms matured upon different dates and bore interest at the rate of 6½ per annum, payable on the Fidelity Trust & Savings Bank. The mortgagee indated trust, issued not realize and con-

tained other usual provisions of such trust deeds. Section 4, article 7, of the trust deed provides:

"In order to further insure the prompt payment of principal and interest as installments mature under the terms of this Trust Deed, said party of the first part does hereby covenant and agree that beginning on the 25th day of February, 1927, and on the 25th day of each of the five months immediately succeeding thereafter, it will deposit with the Fidelity Trust & Savings Bank at Chicago, Illinois, for the account of the bondholders, a sum of money which shall be equal to one-sixth of the total semi-annual interest charges for the six months period beginning January 25th, 1927, and ending July 24th, 1927, and thereafter beginning July 25, 1927, will deposit in equal monthly payments on the 25th day of each of the months of each year, during the life-time of the indebtedness, secured by this indenture, a sum of money which shall be equal to one-sixth of the amount of the next succeeding semi-annual interest charges falling due for the current one-half year periods, respectively.

**** The principal sum due January 25th, 1933, shall be deposited at the Fidelity Trust & Savings Bank on or before January 25th, 1933. The intent hereof is that such aggregate deposit one month before the day of each semi-annual interest payment shall be sufficient to meet each interest payment when due and as it matures, and such aggregate deposit one month before the date of each annual principal payment shall be sufficient to meet such principal payments when and as each matures (except the portion of the principal payment falling due January 25th, 1933, as herein provided for.)"

Yavitch and wife thereafter conveyed the premises to Reinhold Huck and Irwine Huck, his wife, subject to the trust deed, and Huck and wife in turn conveyed the same to the Arnold Apartments Building Corporation, which now claims the fund. The conveyance was made subject to the encumbrance, but there is no evidence that the Building corporation expressly assumed and agreed to pay the encumbrance.

However, the corporation recognized the validity of the encumbrance, and after acquiring title in conformity with the provisions of said section 4, it from time to time deposited moneys with the Fidelity Trust & Savings Bank money in a fund bearing the designation "Arnold Apartments Sinking Fund, Account No. 43034." This account was opened January 28, 1929, and was closed November 7, 1930, by the withdrawal of $2532.82 therefrom, this being the fund here in controversy.

latter other bond attributes of each bond block. Paragraph 2, article 7, of the trust deed provides:

"In order to further insure the prompt payment of principal and interest as installments mature under the terms of this trust deed, each party of the first part does hereby covenant and agree that beginning on the 20th day of February, 1927, and on the 20th day of each of the five months immediately succeeding thereafter, it will deposit with the Fidelity Trust & Savings Bank at Cleveland, Ohio, for the account of the bondholders, a sum of money which shall be equal to one-sixth of the semi-annual interest charges for the current year (or semi-annual interest charges falling due for the current one-half year periods, respectively).

--- The principal sum due January 20th, 1932, shall be deposited at the Fidelity Trust & Savings Bank on or before January 20th, 1932. The interest accrued to that date shall be made before the day of each semi-annual interest payment when the same shall be sufficient to meet each interest payment when the sum of six months, and such aggregate deposit one month before the date of each annual principal payment shall be sufficient to meet such principal payments when and as such matures (except the portion of the principal payment falling due January 20th, 1932, as herein provided for.)"

Davies and his partner conveyed the premises in "Cuyahoga Block and Swing Block, his wife, subject to the trust deed, and Block and wife in turn conveyed the same to the Arcade Apartments Building Corporation, which now claims the fund. The conveyance was made subject to the encumbrance, but there is no evidence that the Building corporation expressly assumed and agreed to pay the encumbrance.

However, the corporation recognized the validity of the encumbrance, and after acquiring title in conformity with the provisions of said section 4, it from time to time deposited money with the Fidelity Trust & Savings Bank and it was placed the designation "Arcade Apartments Sinking Fund, Account No. 6834." This account was opened January 20, 1928, and was closed November 7, 1928, by the withdrawal of $2320.82 therefrom, this being the fund here in controversy.

On April 25, 1930, default having been made, the trustee filed its bill in behalf of the bondholders to foreclose the trust deed. On April 28, 1930, Chester R. Davis was appointed receiver of the property, and on October 28, 1931, a decree of foreclosure was entered. This decree finds that bonds Nos. 11 to 16, inclusive, for the sum of $1,000 each, together with interest coupons, became due and payable January 25, 1930; that interest coupons Nos. 17 to 220, inclusive, became due and payable on the same day, and that March 25, 1930, and for a long time prior thereto the Fidelity Trust & Savings Bank was the legal holder and owner of certain of the bonds which are described. The decree finds the entire amount due under the bonded indebtedness, but it does not appear that any credit was given for this sum of $2532.82, which remained in the sinking fund.

The last deposit in the sinking fund prior to the withdrawal of the account was made November 25, 1929. The next payment of principal and interest according to the terms of the trust deed would fall due on January 25, 1930. From January 25, 1930, to April 23, 1930, Mr. Fitzhugh (the manager and an officer of the Arnold Apartments Building Corporation) was conducting negotiations through Mr. Reichmann (one of the attorneys for the trustee, as well as for the Fidelity Trust & Savings Bank and certain bondholders) with reference to an extension agreement as to the maturing bonds. Mr. Fitzhugh testifies that Mr. Reichmann said, "You get $4500 and take it out of the bank and show me you have the money," and that at the suggestion of Mr. Warner (the then president of the Fidelity Trust & Savings Bank) $2500 was withdrawn from the sinking fund and delivered to him (the witness), and that he (the witness) added thereto $4500 in cash produced by the Arnold Apartments Building Corporation from other funds, and that the total sum of $7,000 demanded by Reichmann was by agreement put in a lockbox in

On March 22, 1930, Lehman Bros. saw such, the Upstate filed its bill in behalf of the bondholders to foreclose the trust deed. On April 22, 1930, Chester A. Davis was appointed receiver of the property, and on October 22, 1931, a decree of foreclosure was entered. This decree finds that bonds has, 11 to 18, inclusive, for the sum of $1,000 each, together with interest coupons, because due and payable January 22, 1930; that interest coupons Nos. 17 to 28, inclusive, bonds due and payable on the same day, and that March 22, 1930, and for a long time prior thereto the Fidelity Trust & Savings Bank was the legal holder and owner of certain of the bonds which are described. The decree finds the entire amount due under the bonded indebtedness, but it does not appear that any credit was given for this sum of $1000.00, which remained in the sinking fund.

The last deposit in the sinking fund prior to the withdrawal of the amount was made November 22, 1930. The next payment of principal and interest according to the terms of the trust deed would fall due on January 22, 1931. From January 30, 1930, to April 22, 1930, Mr. Pitkin (the manager and an officer of the Fidelity Savings Building Corporation) was endeavoring negotiations toward Mr. Fairbanks (and of his attorney for the trustee), as well as for the Fidelity Trust & Savings Bank and certain bondholders with reference to an extension agreement as to the maturing bonds. Mr. Pitkin testifies that Mr. Fairbanks said, "You put $1000 and take it out of the bank and may you have the money," and that at the suggestion of Mr. Fairbanks (the then president of the Fidelity Trust & Savings Bank) $1000 was withdrawn from the sinking fund and delivered to him (the witness), and then he (the witness) added thereto $1000 in cash provided by the Lincoln Apartments Building Corporation from other funds, and that the total sum of $2,000 demanded by Fairbanks was by agreement put in a location in

the bank in the joint names of himself and Mr. Brockhoff, who was then manager of the loan department of the Fidelity Trust & Savings Bank.

April 23, 1930, two days prior to the filing of the bill to foreclose, a certificate was issued to Fitzhugh and Brockhoff which recited:

"This is to certify that V. B. Fitzhugh has deposited in safe deposit box No. 2818, $7000; said box being under the joint control of V. B. Fitzhugh and F. J. Brockhoff; keys to said box are being held by L. M. Kahn for delivery only on joint order of V. B. Fitzhugh, and F. J. Brockhoff for Fidelity Trust & Savings Bank."

Although the decree of foreclosure was entered October 28, 1931, the sale under said decree was not held until April 21, 1932,, and at the time of the proceedings upon the intervening petition this sale had not as yet been reported to the court.

The money in question remained in the safety deposit box until the summer of 1930, when Mr. Fitzhugh and Mr. Brockhoff went to the safety deposit box and took out $500, which was given to Mr. Fitzhugh, and later, August 7, 1930, Mr. Fitzhugh and Mr. Brockhoff again visited the box and took out the remaining $6,500. Mr. Fitzhugh retained $4000 of this amount and handed Mr. Brockhoff $2500 for deposit in the Uptown State Bank in the name of "Arnold Apartments Sinking Fund." On November 7, 1930, the Uptown State Bank took this money with interest, then amounting to $2532.32 out of the savings fund account and deposited it in a general account, where it remained until May 5, 1932, when Fitzhugh, on behalf of the Arnold Apartments Building Corporation, tendered to the bank the deposit slip given to him on August 7, 1930, and demanded the money with interest. He was informed by the cashier that the money had been withdrawn and the account closed November 7, 1930. Thereafter, on May 10, 1932, the intervening petition was filed.

The real question for determination here is whether this

the fund in the joint names of himself and Mr. Irwinhart, who was then manager of the loan department of the Fidelity Trust & Savings Bank.

April 23, 1926, two days prior to the filing of the bill in Interplead, a certificate was issued in Fitzhugh and Irwinhart which recited:

"This is to certify that V. E. Fitzhugh has deposited in safe deposit box No. 3822, $7000; said box being under the joint control of V. E. Fitzhugh and J. J. Irwinhart; keys to said box are being held by L. S. Lamm for delivery only on joint order of V. E. Fitzhugh, and R. J. Irwinhart for Fidelity Trust & Savings Bank."

Although the decree of Interplead was entered October 23, 1926, the safe deposit box remained not held until April 12, 1932, and at the time of the proceedings upon the intervening petition this safe had not as yet been reported to the court.

The money in question remained in the safety deposit box until the summer of 1930, when Mr. Fitzhugh and Mr. Irwinhart went to the safety deposit box and took out $7000, which was given to Mr. Fitzhugh, and later, August 7, 1930, Mr. Fitzhugh and Mr. Irwinhart again visited the box and took out the remaining $4,500. Mr. Fitzhugh retained $4000 of this amount and handed Mr. Irwinhart $500 for deposit in the Uptown State Bank in the name of "Arnold Apartments Sinking Fund." On November 7, 1930, the Uptown State Bank took this money with interest, then amounting to $502.50 out of the savings fund account and deposited it in a general account, where it remained until May 2, 1932, when Fitzhugh, on behalf of the Arnold Construction Building Corporation, tendered to the bank the deposit slip given to him on August 7, 1930, and demanded the money with interest. He was informed by the cashier that the money had been withdrawn and the account closed November 7, 1930. Thereafter, on May 12, 1932, the intervening petition was filed.

The real question for determination here is whether this

money deposited in the sinking fund was impressed with a trust in favor of the bondholders, as the trustee contends, or whether it was a simple deposit of money by the Building Corporation in the predecessor of the intervening bank which was subject to withdrawal by the depositor. There is some discussion in the briefs as to the question of whether the Building Corporation assumed and agreed to pay the mortgage indebtedness. That question, as we view this record, is not important.

It is undisputed that the Building Corporation took title to the property; that it recognized the trust deed as a valid incumbrance and made the deposits in the sinking fund in conformity with its provisions and negotiated with the owners of the bonds and the trustee for an extension of the debt. It is not claimed that the corporation was in ignorance of the terms and provisions of the trust deed, or that it questioned the validity of the trust deed as a lien upon its property. It affirmatively appears that in its dealings with the bondholders the corporation made the deposit in the sinking fund with the intention of complying with the provisions of the trust deed. One who takes title to real estate subject to a trust deed which is of record, is charged with notice of the existence of the deed and the terms of the conveyance, and so far as his future dealings with the property are concerned will be bound by its provisions. Cain v. Barsaloux, 299 Ill. 371.

There is no evidence that indicates that at the time of making these deposits in the sinking fund the Building Corporation retained any authority to withdraw the funds or that it retained any control or direction thereof. That the depositary and its agents apparently had the sole authority to pay out the funds, is indicated by the fact that its authority was recognized in drawing out the $2500 to be used in negotiations for the purpose of getting

money deposited in the sinking fund was impressed with a trust in favor of the bondholders, as the trustee contends, or whether it was a simple deposit of money by the Building Corporation in the predecessor of the intervening bank which was subject to withdrawal by the depositor. There is some discussion in the briefs as to the question of whether the Building Corporation assumed and agreed to pay the mortgage indebtedness. That question, as we view this record, is not important.

It is unimportant that the Building Corporation had title to the property; that it promulgated the trust deed as a valid instrument and made the deposits in the sinking fund in conformity with its provisions and negotiated with the owners of the bonds and the trustee for an extension of the debt. It is not claimed that the corporation was in ignorance of the terms and provisions of the trust deed, or that it questioned the validity of the trust deed as a lien upon its property. It affirmatively appears that in its dealings with the bondholders the corporation made the deposit in the sinking fund with the intention of complying with the provisions of the trust deed. One who takes title to real estate subject to a trust deed which is of record, is charged with notice of the existence of the deed and the terms of the conveyance, and so far as his future dealings with the property are concerned will be bound by its provisions. Gain v. Barnelson, 209 Ill. 471.

There is no evidence that indicates that at the time of making these deposits in the sinking fund the Building Corporation retained any authority to withdraw the funds or that it retained any control or direction thereof. Thus the depositary and its agents apparently had the sole authority to pay out the funds, it indicates by the fact that its authority was recognized in dealing with the lien in a manner in accordance for the express stipulations

an extension of the loan. When the negotiations for an extension failed, the Building Corporation consented to the redeposit of this $2500 in the sinking fund after it was withdrawn from the safety deposit box. The principal and the interest were then in default and the bill to foreclose the trust deed was pending. The Building Corporation made no claim on the fund at that time, when it is fair to presume the claim would have been made had it been supposed that it existed. The silence of the Building Corporation in this respect for a year and a half is significant. It does not amount to an estoppel, but it does show the attitude of the Building Corporation toward this fund at that time.

If the fund was originally a trust fund for the benefit of the bondholders (which it seems to us it must have been), it would remain a trust fund for their benefit until they were paid in full so long as it could be traced or its identity established. Williams v. Evans, 154 Ill. 98; Hubbard v. Buddemeier, 328 Ill. 76.

The Building Corporation urges that the fund at no time became the property of the bondholders or the trustee, and in support of this contention cites a large number of cases, such as Rohrer v. Heatherage, 336 Ill. 430; Dillon v. Dyer, 258 Ill. App. 144; Wolf v. DeWolf & Co., 53 Fed. (2nd) 989, all of which are to the effect that until such time as a mortgagee asserts his right under the mortgage to the possession of the property by filing a bill of foreclosure, or, if the property is in the hands of a third party, by demanding possession, the mortgagee has no right to the rents, issues and profits of the mortgaged premises, although such rents, issues and profits are by the terms of the trust deed conveyed to the trustee. There is no question about this rule of law, but it is not, in our opinion, applicable to this case. This fund is not claimed upon the theory that it belongs to the trustee as rents, issues and profits of the mortgaged premises. On the contrary, the

an extension of the loan. When the negotiations for an extension failed, the building corporation commenced to the repayment of this $5000 in the claiming that after it was withdrawn from the mutuly deposit box. The principal and the interest were both in default and the bill to foreclose the trust deed was pending. The building corporation made no claim on the loan at that time, when it is fair to presume the claim would have been made had it been recognized that it existed. The alleged of the building corporation in this respect for a year and a half is significant. It does not amount to an estoppel, but it does show the attitude of the building corporation toward this fund at that time.

If the fund was originally a trust fund for the benefit of the bondholders (which it seems to be it must have been), it would remain a trust fund for their benefit until they were paid in full as long as it could be traced or its identity established. Billings v. Trust, 144 Ill. 99; Kohlsaat v. Chatsworth, 188 Ill. 76.

The building corporation argues that the fund at no time became the property of the bondholders or the trustee, and in support of this contention cites a large number of cases, such as Hunter v. Bartlesville, 226 Ill. 490; Gilles v. Dyer, 166 Ill. 144; Wolf v. Dwight & Co., 83 Ind. (Ind) 492, all of which are to the effect that until such time as a mortgagee exercise his right under the mortgage to the possession of the property by filing a bill of foreclosure, or, if the property is in the hands of a third party, by demanding possession, the mortgagee has no rights to the rents, issues and profits of the mortgaged premises, although such rents, issues and profits are by the terms of the trust deed conveyed to the trustee. There is no question about this rule of law, but it is not, in our opinion, applicable to this case. This fund is not claimed upon the theory that it belongs to the trustee as rents, issues and profits of the mortgaged premises. On the contrary, the

evidence affirmatively shows that part of the money deposited in the fund was not rents, issues or profits. The theory of the trustee, as we understand it, is that by depositing this money in a fund specially designated to be for the benefit of the bondholders, the fund was impressed with a trust in their favor, and that until such time as they have been paid in full its trust character remains.

It is contended by the Building Corporation that the effect of the deposit of this money was to create between the bank and the Building Corporation the relation of banker and depositor and nothing more. As already stated, the manner in which the deposit was made in this special fund (evidently in conformity with the provisions of section 4 of the trust deed), the manner in which the fund was dealt with, and the conduct of the parties with reference to the deposit, make it impossible to accept this theory.

People v. Belt, 271 Ill. 342, and McCormick v. Hopkins, 287 Ill. 66, are cited by the Building Corporation in this connection. In the case of People v. Belt, supra, the defendant was on trial charged with accepting a deposit while knowing the bank to be insolvent. It was contended as a matter of defense that the issuance of a certificate of deposit bearing interest should be regarded as a loan and not a deposit within the meaning of the criminal law. It was held to be a deposit within the meaning of the criminal code.

In McCormick v. Hopkins, supra, a certificate of deposit had been issued by the LaSalle Street Trust & Savings Bank in return for cash, and the bank closed without paying the certificate. The plaintiff's account had been insured against loss of deposits. Plaintiff as holder of the certificate sued the surety company on its guaranty. The surety company defended on the theory that the certificate did not represent a deposit within the meaning of the insurance contract. The court, citing Kavanagh v. Bank of America, 339 Ill. 404, held that such a certificate was in legal effect a promissory note and

evidence affirmatively shows that part of the money originally in the fund was not yours, issues or profits. The theory of the trustee, as we understand it, is that by depositing this money in a fund specially designated to be for the benefit of the beneficiaries the fund was impressed with a trust in their favor, and that until such time as they have been paid in full its trust character remains.

It is contended by the Building Corporation that the effect of the deposit of this money was to create between the bank and the Building Corporation the relation of lender and depositor and debtor. As already stated, the manner in which the deposit was made in this special fund (evidently in conformity with the provisions of section 4 of the trust deed), the manner in which the fund was dealt with, and the conduct of the parties with reference to the deposit, make it impossible to accept this theory.

Pennie v. Bell, 275 Ill. 541, and Kaufmann v. Kaufmann, 247 Ill. 66, are cited by the Building Corporation in this connection. In the case of Pennie v. Bell, supra, the defendant was an infant charged with receiving a deposit while knowing the bank to be insolvent. It was contended as a matter of fairness that the insolvency of a certificate of deposit bearing interest should be regarded as a loan and not a deposit within the meaning of the criminal law. It was held to be a deposit within the meaning of the criminal code.

In Kaufmann v. Kaufmann, supra, a certificate of deposit had been issued by the Lafayette Street Trust & Savings Bank in return for stock, and the bank closed without paying the certificate. The plaintiff's account had been insured against loss of deposits. Plaintiff's holder of the certificate was the party entitled to its insurance. The county company defended on the theory that the certificate did not represent a deposit within the meaning of the insurance contract. The court, citing Kaufmann v. Bank of Morris, 245 Ill. 434, said that such a certificate was in legal effect a promissory note and

negotiable, but further held as between the assured and the surety company that the money would be regarded as a deposit. In these cases, however, a specific written statement was given the depositor to the effect that the holder of the certificate would be paid the money represented by the certificate in due course. There is no such agreement either written or oral on the part of the depositary bank in this case.

It is further contended in behalf of the Building Corporation that the trustee is precluded from recovery because of the merger of all the obligations of the trust deed in the decree of foreclosure entered October 24, 1931, and the sale thereunder on April 21, 1932. Lightcap v. Bradley, 186 Ill. 510; Chicago Title & Trust Co. v. Prendergast, 250 Ill. App. 312, and Hack v. Snow, 252 Ill. App. 51, are cited. It is worthy of notice that the case last cited was reversed by the Supreme court in 338 Ill. 26. The decree of foreclosure had not been entered at the time these payments were made, and when the trust in favor of the bondholders first came into existence. It does not appear whether the amount for which the property was sold was sufficient to satisfy the decree or, indeed, that the sale has thus far been approved by the court. The bondholders are entitled to have the trust which was created for their benefit continue until such time as the indebtedness due them has been satisfied.

The court erred in finding that the Building Corporation was entitled to this fund, and the decree will therefore be reversed and the cause remanded with directions to enter an order finding that this money constitutes a trust fund for the benefit of the bondholders and that the same should be applied to the payment of any amount unpaid and now due them, the surplus, if any, to be turned over to the Building Corporation.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

negotiable, but further held as between the assured and the surety company that the money would be repaid on a deficit. In some cases, however, a specific written statement was given the bondholder to the effect that the holder of the certificate would be paid the money represented by the certificate in due course. There is no such agreement either written or oral on the part of the depositary bank in this case.

It is further contended in behalf of the initiating corporation that the trustee is precluded from recovery because of the payment of all the obligations of the trust deed in the decree of foreclosure entered October 24, 1932, and the sale thereunder on April 21, 1932. Wilkinson v. Bradley, 108 Ill. 633; Chicago Title & Trust Co. v. Fraunhofer, 264 Ill. App. 514, and Hunt v. Snow, 272 Ill. App. 21, are cited. It is worthy of notice that the case last cited was reversed by the Supreme court in 332 Ill. 18. The decree of foreclosure had not been entered at the time these payments were made, and when the trust in favor of the bondholders first came into existence. It does not appear whether the amount for which the property was sold was sufficient to satisfy the decree or, indeed, that the sale has ever been confirmed by the court. The bondholders are entitled to have the trust which was created for their benefit continue until such time as the indebtedness due them has been satisfied.

The court erred in finding that the initiating corporation was entitled to this fund, and the decree will therefore be reversed and the cause remanded with directions to enter an order finding that the money constitutes a trust fund for the benefit of the bondholders and that the same should be applied to the payment of any amount unpaid and not due at the time, the adjudication, if any, to be issued upon the initiating corporation.

REVERSED AND REMANDED WITH DIRECTIONS.

Bartelme, P. J., and O'Connor, J., concur.

36364

PRINCKE-ELLIS COMPANY,
a Corporation,
Appellee,

vs.

MORTON MANUFACTURING COMPANY,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

36

269 I.A. 645

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment finding it guilty of contempt of court and imposing a fine of $500 for the alleged failure to comply with an order requiring defendant to permit plaintiff to examine certain of its books and records, pursuant to section 9, chapter 51, Revised Statutes (Cahill). This section is as follows:

"The several courts shall have power, in any action pending before them, upon motion, and good and sufficient cause shown, and reasonable notice thereof given, to require the parties, or either of them, to produce books or writings in their possession or power which contain evidence pertinent to the issue."

We do not deem it necessary to determine whether or not the statement of claim states a good cause of action, for we are of the opinion that there was no sufficient showing made to the court which would justify the order for the inspection of defendant's books. Plaintiff is suing to collect a bonus or commission on the sales of certain "suggestion boxes," which are used in connection with a system of advertising. Plaintiff's affidavit asserts, on information and belief, that defendant has sold at least three thousand of these "boxes;" defendant's counter-affidavit denies that it has sold this number and alleges as a fact that since making the contract less than one thousand "boxes" or "suggestion systems" have been sold by defendant; that all of said sales are set forth in the "sales register" kept by defendant in the due course of business, and that all of said sales

Suits

PRINCE-MILLS COMPANY,
a Corporation,

Appellee,

vs.

NORTH ELECTRICITIES COMPANY,
a Corporation,

Appellant.

ATTAR, JUDGE ADVISORY, COURT
OF ORIGINAL.

IN. PRESCRIBE JUDICIAL AUTHORITY
DEFINING THE STATUS OF THE CASE.

Defendant appeals from a judgment finding its guilty of contempt of court and imposing a fine of $500 for the alleged failure to comply with an order requiring defendant to permit plaintiff to examine patents of its books and records, pursuant to section 9, chapter 83, Revised Statutes (1881). This section is as follows:

"If material evidence shall have been given in any action pending before them, upon motion, and there not sufficient cause shown, and reasonable notice having been given, to produce the pattern, or other of them, to produce books or writings in their possession or power which contain evidence pertinent to the issue.

To do not deem it necessary to determine whether or not the statement of claim states a good cause of action, for we are of the opinion that there was no sufficient showing made to the court which would justify the order for the inspection of defendant's books. Plaintiff in asking to subject a house on commission on the sales of certain "nuggetson boxes," which are used in connection with a system of advertising. Plaintiff's affidavit asserts, on information and belief, that defendant has sold at least three thousand of these "boxes;" defendant's counter-affidavit denies that it has sold half a number and alleges as a fact that since making the contract less than one thousand "boxes" or "suspension systems" have been sold by defendant; that all of said sales are set forth in the "sales register" kept by defendant in the course of business, and that all of said sales

were made between October 1, 1927, and January 14, 1928; under the contract sued on, plaintiff was entitled to commissions only on sales in excess of one thousand boxes. In Cassary v. Carter, 84 Fed. 416, the court held that it is not sufficient in these proceedings to state that affiant "believes" the books called for would tend to prove plaintiff's claim; that if a mere affidavit of belief were all that was required, each party to a suit might compel from the other a general production of numerous books and papers so that the moving party could sift out of them any circumstances tending to support his position. This would give a party the right to "search through a mass of private transactions with the mere hope of finding therein something relevant to the cause in issue."

In Garden v. Zusminger, 329 Ill. 612, it was held that an order which left to the discretion of the attorneys of the moving parties to determine what was or was not material to the issue, was improper. This case also held that in such a motion the court should consider the defendant's counter-affidavit. Plaintiff's brief does not controvert this point.

The record also supports defendant's assertion that it complied with the order. The order required defendant to permit the plaintiff to examine all books "which will disclose the number of 'suggestion systems' sold by the said defendant from June 21, 1927, to the date of filing suit herein," which was August 8, 1930. Plaintiff's petition for a rule upon defendant to show cause, asserted that Mr. Ellwood, an auditor representing it, demanded that defendant submit for examination all books and records which would disclose the number of "suggestion systems" sold by defendant from June 21, 1927, but that defendant refused to comply with said order of court; that some of the books and

were made between October 1, 1927, and January 14, 1928; under the contract used on, plaintiff was entitled to commissions only on sales in excess of one thousand boxes. In Lawrence v. Hartman, 24 Pac. 352, the court held that it is not sufficient in these proceedings to state that affiant "believes" the books called for would tend to prove plaintiff's claim; that if a mere affidavit of belief were all that was required, each party to a suit might compel from the other a general production of numerous books and papers on that the moving party could sift out of them any circumstance tending to support his position. This would give a party the right to "search through a mass of private transactions with the mere hope of finding therein something relevant to the cause in issue."

In Larson v. Swedberg, 200 Ill. 414, it was held that an order which left to the discretion of the adversary of the moving party to determine what was or was not material to the issue, was improper. This case also held that in such a motion the court should consider the defendant's counter-affidavit. Plaintiff's brief does not controvert this point.

The second clause supports defendant's assertion that it complied with the order. The order required defendant to permit the plaintiff to examine all books "which will disclose the number of 'suggestion systems' sold by the said defendant from June 21, 1927, to the date of filing such herein," which was August 6, 1928. Plaintiff's petition for a rule upon defendant in show cause, asserted that Mr. Bilwood, on another occasion, demanded that defendant submit for examination all books and records which would disclose the number of "suggestion systems" sold by defendant from June 21, 1927, but that defendant refused to comply with said order of court; that some of the books and

files submitted to plaintiff for examination were sealed and covered up so that plaintiff's agents could not determine the entries comprised in such portions of the books sealed and covered up. Defendant's answer claimed that it had turned over for inspection to plaintiff's agents all books and records "pertaining to sales of suggestion boxes from June 21, 1927" to August 8, 1930; defendant further states that the first sale during this period was in September, 1927, and the last was extended in the sales register on February 1, 1928, and that the only sales shown in its books are between these dates; that the reason defendant did not permit a general inspection of its books and records covering all business of the defendant during the period covered by the order was, that the order restricted the right of inspection and examination to books and records relating to sales made during said period; that if the order had authorized a general examination and inspection of defendant's books and records relating to other business transacted during said period, it would have violated the rights of this defendant; defendant further said that no portion of any books or records mentioned in the court order was sealed; that the statements in the affidavit of Ellwood to the effect that defendant did not disclose all its books and records appertaining to sales of "suggestion boxes" made between June 21, 1927, and August 8, 1930, are untrue; defendant further asserted that plaintiff was a business competitor of defendant; that defendant sells to business concerns of all kinds advertising and sales stimulating material; that plaintiff is an advertising agency; that much of defendant's material and methods cannot be protected by patent or copyright, but are valuable and the result of expenditure of much work and money; that defendant's books also contain the names of its customers, and that defendant should not be required to permit plaintiff to

and that defendant should not be enjoined to permit plaintiff to
inspect defendant's books also covering the manner of its business,
relations and the family of proprietors of mean work and manual;
methods cannot be protected by patent or copyright, but are
in an advertising sense; that much of defendant's material and
kinds advertising and sales stimulating material; that plaintiff
of defendant; that defendant seeks to business concerns of all
Further further essential that plaintiff was a business association
made between June 21, 1927, and August 4, 1930, are unfair; de-
books and records appertaining to sales of "subscription bonus"
filmed to the effect that defendant did not disclose all its
said that no portion of any books or records mentioned in the
court order was sealed; that the statements in the affidavit of
have violated the rights of this defendant; defendant further
taking in other business transacted during sale period, it would
taking sale period; that if the order had authorized a general
examination and inspection of defendant's books and records ex-
tion and examination in books and records relating to sales made
by the order, that the order restricted the right of inspec-
allowing of, business of the defendant during the period mentioned
in the bonus are between defendant and the business defendant
the business association of plaintiff and defendant, on February 1, 1927, and that the last was extended in the
period was in September, 1927, and the last was extended in the
to sales of subscription bonus from June 21, 1927, to August 4,
1930; defendant further states that the first sale during this
specimen to plaintiff's agents all books and records "pertaining
to the business association of defendant's material and
stated to be in such portions of the books sealed and mentioned
by. Defendant's answer claimed that it had turned over for in-
tiffs contained in such portions of the books sealed and mentioned
stated by to that plaintiff's agents could not determine the ac-
plaintiff's business association

examine all these records which do not relate to sales of "suggestion boxes."

The court heard the testimony of witnesses which tended in the main to support the allegations of Ellwood's affidavit with reference to the books submitted for examination, and also the allegations of defendant's answer. We hold that the order limited the inquiry to the sales of "suggestion boxes" or "systems." It did not call for a sweeping examination of all of defendant's books and records. Upon the showing made, we are of the opinion that defendant complied with the order.

For the reasons indicated, the judgment finding the defendant was in contempt, is reversed.

REVERSED WITHOUT REMANDING.

Matchett, J., concurs.

O'Connor, J.: I agree with the result but not with all that is said in the opinion.

examine all these records which do not relate to sales of "suggestion boxes."

The court heard the testimony of witnesses which tended in the main to support the allegations of ELLWood's affidavit with reference to the books submitted for examination, and also the allegations of defendant's answer. It held that the order limited the inquiry to the sales of "suggestion boxes" or "systems." It did not call for a revealing examination of all of defendant's books and records. Upon the showing made, we see of the opinion that defendant complied with the order.

For the reasons indicated, the judgment finding the defendant was in contempt, is reversed.

REVERSED WITHOUT DISMISSAL.

Gaskins, J., concurs.

O'Connor, J.: I agree with the result but not with all that is said in the opinion.

36373

EDLA DIXON,
Appellee,

vs.

CITY OF CHICAGO, a
Municipal Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

37

269 I.A. 645[2]

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff while riding in an automobile in Chicago was injured when the automobile ran into a hole or rut in the street; she brought suit and had a verdict against the defendant for $3,500; judgment was entered for this amount and defendant appeals.

The accident happened on 87th street, which runs east and west, at a point about twenty feet east of the viaduct by which the Rock Island railroad passes over 87th street; the street underneath the viaduct was paved with brick and was about fourteen feet wide; as the street emerges east of the viaduct it divides into two driveways; one for eastbound traffic, turns to the right around a curve to the eastbound lane. As originally constructed there was a wooden curb along the southerly edge of the brick pavement, but the curve to the right was short, and about two or three years before the accident the street was widened by moving the curbing south a few feet and a new cement curbstone was put in place; the space between the south edge of the brick street pavement, the old roadway, and the new curbstone, was filled in with cinders and dirt. In driving east on 87th street and in making the turn to the right to get in the eastbound lane vehicles would drive off the edge of the brick pavement and would run into this unpaved space between it and the new curbstone, causing a hole in it from eight to twelve inches deep and from twelve to fourteen feet in length; this hole had been

88272

MARY JOHNSON,

Appellee,

vs.

CITY OF CHICAGO, a
Municipal Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

263 I.A. 646

Plaintiff while riding in an automobile in Chicago was injured when the automobile ran into a hole or rut in the street; she brought suit and had a verdict against the defendant for $3,000; judgment was entered for this amount and defendant appeals.

The accident happened on 87th street, which runs east and west, at a point about twenty feet east of the viaduct by which the New Lakes Railroad passes over 87th street; the street underneath the viaduct was paved with brick and was about fourteen feet wide; as the street emerges east of the viaduct it divides into two driveways; one for eastbound traffic, turns to the right around a curve to the westbound lane. An originally constructed there was a wooden curb along the southerly edge of the brick pavement, but the curve to the right was short, and about two or three years before the accident the street was widened by moving the curbing south a few feet and a new cement curbstone was put in place; the space between the south edge of the brick street pavement, the old roadway, and the new curbstone, was filled in with cinders and dirt. In driving east on 87th street and in making the turn to the right to get in the eastbound lane vehicles would drive off the edge of the brick pavement and would run into this loose space between it and the new curbstone, causing a hole in it from eight to twelve inches deep and from twelve to fourteen feet in length; this hole had been

there for a period of one or two years before the accident in question.

Between nine and ten o'clock in the evening of August 24, 1930, plaintiff with her husband and son was riding in an automobile going eastward, the son driving and plaintiff and her husband in the rear seat. The son testified that he had been over this place three or four times prior to this evening; that he had the driving lights on and was going between three and five miles an hour as he approached the curve; that first the front wheel and then the rear wheel went into the hole. Plaintiff was thrown first to the right and then to the left, and then to the floor of the car. Plaintiff says she did not know anything for a minute but felt a severe pain in the lower part of her back and then in her head.

Defendant argues that the court should have given a peremptory instruction for the defendant, as the City is not required to pave its streets for any specific width. It is the duty of a municipality to exercise ordinary care to maintain a highway in reasonably safe condition for traffic. The question is whether or not, in widening the street at this point by moving the curb several feet away from the paved portion, the City was negligent in leaving the strip next the new curb unpaved and permitting a large hole or rut to remain on this unpaved strip for one or two years. The jury could properly find that this was negligence on the part of the City.

A person lawfully using a public highway has a right to presume that the same is reasonably safe for ordinary travel. City of Spring Valley v. Havin, 182 Ill. 232; City of East Dubuque v. Burhyte, 173 Ill. 553; City of Beardstown v. Smith, 150 Ill. 169. It is sufficient to charge the municipality with notice where a defect is shown to have existed for so long a time that the municipality in the exercise of ordinary care should have learned of it. Graham v. City of Rockford, 238 Ill. 214; City of Mattoon v. Fuller,

there for a period of one or two years before the serious is question.

Between nine and ten o'clock in the evening of August 26, 1920, Flakbilt with her husband and son was taking in an automobile going eastward, the son driving and Flakbilt and her husband in the rear seat. The son testified that he had been over this road three or four times prior to this evening; that he had the driving lights on and was going between three and five miles an hour as he approached the curve; that first the front wheel and then the rear wheel went into the hole. Flakbilt was thrown first to the right and then to the left, and then to the floor of the car. Flakbilt says she did not know anything for a minute but felt a severe pain in the lower part of her back and then in her head.

Defendant argues that the court should have given a peremptory instruction for the defendant, as the city is not required to pave its streets for any specific width. It is the duty of a municipality to exercise ordinary care to maintain a highway in reasonably safe condition for travel. The question in whether or not, in widening the street at this point by moving the curb several feet away from the paved portion, the city was negligent in leaving the strip back the new curb unpaved and permitting a large hole or rut to remain on this unpaved strip for one or two years. The jury could properly find that this was negligence on the part of the city.

A person lawfully using a public highway has a right to presume that the same is reasonably safe for ordinary travel. City of Sioux Falls v. Kuehn, 44 Ill. App. 661; City of East Dubuque v. Kaepple, 172 Ill. 286; City of Bloomington v. Bell, 134 Ill. 129. It is sufficient to charge the municipality with notice where a defect is shown to have existed for so long a time that the municipality in the exercise of ordinary care should have learned of it. Gerdes v. City of Chicago, 208 Ill. 434; City of Galena v. Fisher,

217 Ill. 273; Maxey v. City of S. St. Louis, 158 Ill. App. 627. We cannot say that the verdict of the jury was manifestly contrary to the weight of the evidence.

Defendant says that the amount of the verdict is excessive. Plaintiff suffered severe pain, especially in the region of the right hip joint; a slight discoloration of this joint was found; there was pressure and inflamestion of the sciatic nerve; she was under the care of a physician for about a month, and was then examined by a second physician who found evidence of tenderness and pain in the right hip joint, which radiated down the right thigh and calf muscles to the foot; the Doctor was of the opinion that the sciatic nerve was affected; she received electrical treatments and ultra violet ray treatments; the Doctor advised that she wear a bandage or belt around the pelvis to limit the motion of any parts that would irritate the sciatic nerve. At the time of the trial, which was over a year after the accident, she was still suffering severe pain from the injuries received. We would not be justified in disturbing the amount of the judgment.

Defendant complains of the refusal of the court to give two instructions tendered by it. The first refused instruction told the jury that a municipality is not required to keep the streets in remote and sparsely settled districts in the same condition as streets and sidewalks in the center of population. There was no evidence that the street where the accident occurred was in a remote or sparsely settled district. A municipality is required to exercise ordinary care to keep all streets within its boundaries reasonably safe for traffic.

Complaint is also made of the court's refusal of defendant's instruction to the effect that if the jury believed that the accident in question was caused by the negligence solely of some person other than the defendant and that it was not caused by negligence of

NY 111. 272; Kenney v. City of N. Y., Sup. Ct. App. Div. 1st Dept. 1924, 209 App. Div. 111. 204. We cannot say that the verdict of the jury was manifestly contrary to the weight of the evidence.

Defendant says that the amount of the verdict is excessive. Plaintiff suffered severe pain, particularly in the region of the right hip joint; a slight disconnection of this joint was found; there was pressure and inflammation of the sciatic nerve; she was under the care of a physician for about a month, and was then examined by a second physician who found evidence of tenderness and pain in the right hip joint, which radiated down the right thigh and calf muscles to the foot; the doctor was of the opinion that the sciatic nerve was affected; she received electrical treatments and ultra violet ray treatments; the doctor advised that she wear a bandage or brace around the pelvis to limit the motion of my joints that would irritate the sciatic nerve. At the time of the trial, which was over a year after the accident, she was still suffering severe pain from the injuries received. We could not be justified in disturbing the amount of the judgment.

Defendant complains of the refusal of the court to give the instructions tendered by it. The first refused instruction said the jury that a municipality is not required to keep the streets in repair and exercise reasonable diligence in the same condition as private and adjacent in the center of population. There was no evidence that the street where the accident occurred was in a remote or sparsely settled district. A municipality is required to exercise ordinary care to keep all streets within the conservative reasonably safe for travel.

Complaint is also made of the court's refusal of defendant's instruction to the effect that if the jury believed that the construction in question was caused by the negligence solely of some person other than the defendant and that it was not caused by negligence

of the defendant, then you should find it not guilty. This instruction tends to confuse. Who is meant by "some person other than defendant"? The evidence established the negligence of the defendant, and in other instructions the court told the jury that before plaintiff could recover it must find the defendant guilty of negligence as charged in the declaration, and that such negligence was the proximate and direct cause of the injury to the plaintiff.

As we cannot say that the verdict was improper and as there were no reversible errors upon the trial, the judgment is affirmed.

AFFIRMED.

Hatchett and O'Connor, JJ., concur.

of the behaviorist, that you doesn't like it not quite. This be-
havioristic theme is serious. The is meant by "from person-level beha-
viorism". The writings presupposed the existence of the defend-
ant, but it might introspection the point that behavior
plausibly could receive it mean that the behavior going at sup-
ligence as observed in his investigation, the last man realizing was
the assistants not clear sense of the latter in the plausibly.

Be or manner jog than the virtue the vagrant and be time
very on irrevocable argue upon the intel, the judgment is affirmed.

AFFIRMED.

Dalmatzo and Clemmer, JJ., concur.

36382

ALBERT F. JOHNSON,
Appellee,

vs.

WAYTE LAUNDRY CO., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

269 I.A. 345

MR. PRESIDING JUSTICE McGURREY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit, alleging that while he was driving his motor vehicle with due care and caution, defendant negligently and carelessly ran his motor vehicle into plaintiff's car, necessitating expenses for repairs. Upon trial by the court defendant was found guilty and plaintiff's damages assessed at $225. Defendant appeals.

Defendant's first point is that the court erred in rendering judgment against defendant because it says that a higher degree of care is required of a motorist passing on the wrong side of the road than is ordinarily required. Even if this were an accurate statement of the law, as no bill of exceptions is in the record, we have no evidence as to the occurrence and therefore can not tell whether or not one of the parties was attempting to pass the other on the wrong side of the road.

The next point is that the court cannot take judicial notice of an ordinance unless the same is pleaded. This is not the rule. Under the statute passed in 1929 courts take judicial notice of municipal ordinances. Chapter 51 Paragraph 57 (Cahill.)

Plaintiff says this appeal is taken merely for delay and asks that we assess statutory damages of ten per cent. Defendant's brief presents no point worthy of serious consideration. We are inclined to believe that the appeal was taken merely for delay. We will therefore affirm the judgment and assess statutory damages of $20 against the defendant.

AFFIRMED, WITH STATUTORY DAMAGES.

Matchett and O'Connor, JJ., concur.

[illegible]

[illegible] F. [illegible],
[illegible],

vs.

[illegible] CO., a Corporation,
[illegible].

[illegible]

[illegible]

Plaintiff brought suit, alleging that while he was driving his motor vehicle with due care and caution, defendant negligently and carelessly ran his motor vehicle into plaintiff's car, necessitating expenses for repairs. Upon trial by the court defendant was found guilty and plaintiff's damages assessed at $285. Defendant appeals.

Defendant's first point is that the court erred in rendering judgment against defendant because it says that a higher degree of care is required of a motorist passing on the wrong side of the road than is ordinarily required. Even if this were an accurate statement of the law, as to all of exceptions in the record, we have no evidence as to the occurrence and therefore can not tell whether or not one of the parties was attempting to pass the other on the wrong side of the road.

The next point is that the court cannot take judicial notice of an ordinance unless the same is pleaded. This is not the rule. Under the statute passed in 1879 courts take judicial notice of municipal ordinances. Chapter 2 Revised St [illegible].

Plaintiff says this appeal is taken merely for delay and asks that we assess statutory damages of ten per cent. Defendant's brief presents no point worthy of serious consideration. We are inclined to believe that the appeal was taken merely for delay. We will therefore affirm the judgment and assess statutory damages of 10% against the defendant.

[illegible], [illegible] Judge.

Barnhart and [illegible], [illegible], concur.

36160

ELI POMMERVILLE,
Defendant in Error,

vs.

WINDALE HOTEL COMPANY, a Corporation,
CHICAGO TITLE & TRUST COMPANY, a
Corporation, J. MILLER HOTEL COMPANY,
a Corporation, and H. B. BROWN,
Plaintiffs in Error.

ERROR TO SUPERIOR
COURT OF COOK COUNTY.

269 I.A. 645[4]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

By this writ of error certain defendants seek to reverse a decree entered by the Superior court of Cook county on July 11, 1932, in a proceeding brought in equity under section 49 of the Chancery act (see Smith-Hurd's Ill. Rev. Stats. 1931, chap. 22 sec. 49, p. 363.) Complainant has not appeared in support of the decree.

The record discloses that the original bill was filed May 6, 1931, and that July 21, 1931, an amended bill was filed. The amended bill was in the usual form of a creditor's bill and averred the recovery of judgment March 30, 1931, by complainant against defendant Windale Hotel Company, a corporation, in the sum of $6782.66, upon an award theretofore made in complainant's favor by the Industrial Commission of the State of Illinois; that execution thereafter issued directed to the Sheriff of Cook county and was returned unsatisfied either in whole or in part; that the judgment debtor, the Hotel Co., for several years prior thereto was engaged in the hotel business at 6019 Winthrop avenue, Chicago, where it owned and occupied real estate described which was improved with a modern hotel building, and that the value of the real estate and building in the year 1929 was approximately $150,000; that this real estate was encumbered by a first mortgage which did not exceed $65,000, and that there were no other liens against it prior to

[illegible] Defendant in Error,

vs.

[illegible] HOTEL COMPANY, a corporation, [illegible] FILED A TRUST MORTGAGE, a [illegible] Corporation, J. [illegible] [illegible], and H. A. [illegible], a [illegible] Plaintiffs in Error.

MR. [illegible] MAGISTRATE [illegible] OF THE COURT:

By this writ of error certain defendants seek to reverse a decree entered by the Superior Court of Cook County on July 11, 1922, in a proceeding brought in equity under section 62 of the Chancery Act (see Smith-Hurd's Ill. Rev. Stats. 1921, ch. 22, sec. 62; p. 285.) Complainant has not appeared in support of the decree.

The record discloses that the original bill was filed May 6, 1921, and that July 21, 1921, an amended bill was filed. The amended bill was in the usual form of a creditor's bill and averred the recovery of judgment March 22, 1921, by complainant against defendant Kinzie Hotel Company, a corporation, in the sum of $[illegible], upon an notes hereinbefore made in consideration of loans by the Industrial Commission of the State of Illinois; that execution thereafter issued directed to the Sheriff of Cook County and was returned unsatisfied either in whole or in part; that the judgment debtor, the Hotel Co., for several years prior thereto was engaged in the hotel business at 2018 Kinzie Avenue, Chicago, where it owned and occupied real estate described which was improved with a modern hotel building, and that the value of the real estate and building in the year 1920 was approximately $[illegible]; that kin[illegible] public was encouraged by a trust mortgage upon all not exceeding $[illegible], and that there were no other liens against it [illegible]

August, 1930; that on or about August 8, 1930, the judgment debtor corporation made a trust deed to Chicago Title & Trust Co. to secure two notes for $22,500 each; that this trust deed was executed while the claim of complainant was pending before the Industrial Commission; that the judgment debtor did not carry compensation insurance at the time complainant was injured, and that it knew that complainant would be entitled to an award of a large sum of money; that anticipating that an award would be entered, the trust deed was made to defeat, hinder or delay complainant in the collection of his claim; that the award was entered in favor of complainant on August 12, 1930; that Max Stein was president and J. Miller secretary of the judgment debtor corporation; that they conspired to defeat, defraud, hinder and delay the collection of the anticipated award; that each one of them took $22,500 of the mortgage notes secured by said deed of August 8th without giving any consideration therefor, for the purpose of hindering, delaying and defeating the anticipated award; that December 24, 1930, the judgment debtor corporation executed an assignment of rents to H. P. Brown, who was a stockholder and interested financially in the judgment debtor corporation; that this assignment of rents was likewise made for the purpose of defeating, defrauding, delaying and hindering the collection of the award; that the assignment was merely colorable; that prior to the entry of the judgment on the award the judgment debtor corporation made a pretended quit-claim of the real estate described to the J. Miller Hotel Co., a corporation, another defendant, for a pretended consideration of $1,000; that the conveyance was a sham and made with the intention of defrauding complainant out of his just demands.

The bill prayed a full and complete discovery; made defendants thereto the Chicago Title & Trust Co., the J. Miller Hotel Co., a corporation, and H. P. Brown; and prayed that the

August, 1930; that on or about August 2, 1930, the Judgment Debtor corporation made a trust deed to Chicago Title & Trust Co. to secure two notes for $20,000 each; that this trust deed was executed while the claim of complainant was pending before the Industrial Commission; that the Judgment Debtor did not carry compensation insurance at the time complainant was injured, and that it knew that complainant would be entitled to an award of a large sum of money; that anticipating that an award would be entered, the trust deed was made to defeat, hinder or delay complainant in the collection of his claim; that the award was entered in favor of complainant on August 12, 1930; that Sam Stein was president and T. Miller secretary of the Judgment Debtor corporation; that they conspired to defeat, defraud, hinder and delay the collection of the multiplicated award; that each one of them took $20,000 of the mortgage notes secured by said deed of August 6th without giving any consideration therefor, for the purpose of hindering, delaying and defrauding the multiplicated award; that October 10, 1930, the Judgment Debtor corporation executed an assignment of rents to W. F. Brown, who was a stockholder and interested financially in the Judgment Debtor corporation; that this assignment of rents was likewise made for the express of defrauding, defeating, delaying and hindering the collection of the award; that the assignment was merely colorable; that prior to the entry of the Judgment on the award the Judgment Debtor corporation made a preferred multi-claim of the real estate described to the T. Miller Hotel Co., a corporation, another defendant, for a preferred consideration of $3,000; that the corporation was a sham and made with the intention of defrauding complainant out of his just demands.

The bill charges a full and complete discovery; each defendants denies the Chicago Title & Trust Co., the T. Miller Hotel Co., a corporation, and W. F. Brown; and argues that the

trust deed of August 8, 1930, the assignment of rents to Brown on December 24, 1930, and the quit-claim deed of February 18, 1931, be declared null and void and set aside; that the judgment debtor be restrained from making any assignment of its property; that a receiver be appointed, and for other and further relief.

The Windale Hotel Co., the J. Miller Hotel Co., and H. B. Brown answered. The cause was put at issue and referred to a master who reported finding that the rendition of judgment, the issue of execution which was returned unsatisfied, the various conveyances as set forth in the bill, and that the deeds of conveyance and the assignment were made while the Windale Hotel Co. was insolvent with knowledge of the insolvency and with knowledge of the pendency of proceedings filed by complainant; that the material allegations of complainant's bill were true, and that complainant was entitled to the relief as prayed. Objections filed by defendants were overruled, and these by order of the court stood as exceptions on the hearing before the chancellor. The court, overruling these exceptions, entered a decree as recommended by the master. The decree found that the conveyances of the real estate and the assignment of rents were made by the judgment debtor while insolvent for the purpose of hindering, delaying and defrauding complainant; that complainant had a good, valid and subsisting lien for the amount of his judgment, which was superior to the right, title and interest of defendants. Edward C. Meyer was appointed receiver of the Windale Hotel Co., and it was ordered by the decree to assign its property to him.

It is urged in behalf of defendants that Stein and Miller who took the notes secured by the trust deed of August 8, 1930, received the same in consideration of sums of money due for services which had theretofore been rendered by them to the Windale Hotel Co., and that said mortgage is valid; that the Hotel Co. could lawfully

trust deed of August 8, 1926, the assignment of rents is shown on December 24, 1926, and the quit-claim deed of February 16, 1931, is declared null and void and set aside; that the judgment debtor be restrained from making any assignment of the property; that a receiver be appointed, and for other and further relief.

The Thomas Corp. Co., the Albion Corp. Co., and C. E. Brown answered. The cause was put at issue and referred to a master who reported finding that the rendition of judgment, the issue of execution which was returned unsatisfied, the various conveyances as set forth in the bill, and that the deeds of conveyance and the assignment were made while the Wheatly Hotel Co. was insolvent with knowledge of the insolvency and with knowledge of the pendency of proceedings filed by complainant; that the material allegations of complainant's bill were true, and that complainant was entitled to the relief as prayed. Objections filed by defendants were overruled, and these by order of the court stood as exceptions on the hearing before the chancellor. The court, overruling these exceptions, entered a decree as recommended by the master. The decree found that the conveyances of the real estate and the assignment of rents were made by the judgment debtor while insolvent for the purpose of hindering, delaying and defrauding complainant; that complainant had a good, valid and subsisting lien for the amount of his judgment, which was superior to the right, title and interest of defendants. Edward G. Hayes was appointed receiver of the Albion Hotel Co., and it was ordered by the decree to recover the property so sold.

It is urged in behalf of defendants that Edwin and Milton who took the notes assumed by the trust deed of August 8, 1926, received the same in consideration of some of money due for services which had theretofore been rendered by them to the Wheatly Hotel Co. and that said assignor is still; that the Hotel Co. owed Lowell

prefer its officers over other creditors. Stein and Miller, however, are not parties to this record and are not here complaining.

It is next urged that there was no proof of the insolvency of the Windale Hotel Co. There was, however, an execution issued on a valid judgment against it which even now remains unsatisfied. This was sufficient proof of insolvency and justified the appointment of a receiver. See Smith-Hurd's Ill. Rev. Stats., chap. 32, secs. 51 to 54, pp. 753 and 754.

It is also urged that the decree is against the manifest weight of the evidence. The facts upon which the decree is based are practically undisputed on the record, and justify the decree. It is therefore affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

under the affidavit and other specimens. Table and affidavit, however, are not particles in this record and are not here considering.

It is most urged that there was no proof of the insolvency of the Bluefish Paint Co. There was, however, an affidavit taken on a valid judgment against it which was now remains unsatisfied. This was sufficient proof of insolvency and justified the appointment of a receiver. See Smith-Hurd's Ill. Rev. Stats., comp. 32, secs. 81 to 84, pp. 7?2 and 7?4.

It is also urged that the decree is against the manifest weight of the evidence. The facts upon which the decree is based are practically undisputed on the record, and justify the decree. It is therefore affirmed.

AFFIRMED.

Mathews, P. J., and O'Connor, J., concur.

36218

CHICAGO TITLE & TRUST COMPANY,
a Corporation,
Appellee,

vs.

LEO WALLACH et al.,
Defendants.

On Appeal of HENRY VANDER VALK,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

269 I.A. 644

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal Henry Vander Valk, the owner of the equity, seeks the reversal of a decree entered in a foreclosure proceeding.

The notes, evidencing an indebtedness of $87,500, executed by Leo Wallach and wife, were secured by a deed of trust conveying the premises in question to complainant as trustee. The first group of bonds, aggregating $8,000, were paid and cancelled. Another group aggregating the principal sum of $7,000 became due and payable, with interest, on March 15, 1931. They were not paid. April 6th the Fidelity Trust & Savings Bank, a corporation, as the legal holder and owner of one of the principal bonds, demanded in writing that the complainant institute foreclosure proceedings. By the terms of the trust deed, under such conditions the complainant, upon demand, was obligated to commence foreclosure proceedings. The cause was referred to a master, who, after hearing evidence, recommended a decree in accordance with the prayer of complainant's bill. Exceptions to this were overruled by the chancellor and the report was approved and a decree entered accordingly.

Defendant Vander Valk first argues that the Fidelity Trust & Savings Bank ceased to function April 6, 1931, and therefore it had no power on that date to call upon the complainant to commence foreclosure proceedings; and that it was not the owner of any bond then unpaid who could declare the principal sum then due. The only evi-

No. 8813.

MICHIGAN TITLE & TRUST COMPANY,
a Corporation,
Appellee,

vs.

LEO WALLACE et al.,
Defendants.

On Appeal of ROBERT WALTER VAIR,
Appellant.

APPEAL FROM ORDER OF THE
CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal Harry Walter Vair, the owner of the equity, seeks the reversal of a decree entered in a foreclosure proceeding.

The notes, evidencing an indebtedness of $87,500, executed by Leo Wallace and wife, were secured by a deed of trust conveying the premises in question to complainant as trustee. The first group of bonds, aggregating $2,500, were paid and cancelled. Another group aggregating the principal sum of $7,000 became due and payable, with interest, on March 15, 1931. They were not paid. April 6th the Fidelity Trust & Savings Bank, a corporation, as the legal holder and owner of one of the principal bonds, demanded in writing that the complainant institute foreclosure proceedings. By the terms of the trust deed, under such conditions the complainant, upon demand, was obligated to commence foreclosure proceedings. The cause was referred to a master, who, after hearing evidence, recommended a decree in accordance with the prayer of complainant's bill. Exceptions to this were overruled by the chancellor and the report was approved and a decree entered accordingly.

Defendant Walter Vair first argues that the Fidelity Trust & Savings Bank ceased to function April 8, 1931, and therefore it had no power on that date to call upon the complainant to commence foreclosure proceedings; and that if was not the owner of any bond then sought who could declare the principal sum then due. The only evi-

dence touching this point is the testimony of a Mr. Anderson, that he was employed in the real estate department of the Uptown State Bank; that the Uptown State Bank assumed the deposit liability of the Fidelity Trust & Savings Bank, "and is now working in connection with the liquidation committee from the Fidelity Trust & Savings Bank in the liquidation of the assets taken over by the Uptown State Bank."

A banking corporation in process of liquidation has power to settle up its affairs, and in dealing with its assets has the same power as an individual would have. There was no evidence that the Fidelity Trust & Savings Bank was in the hands of a receiver, or had surrendered its charter, or had ceased to transact business. The evidence rather shows that it was in process of winding up its business, and during such time certainly could call upon complainant to act upon any bond or bonds which it might hold. In the old case of Ryan v. Dunlap, 17 Ill. 40, it was held that the charter powers of a bank are continued until it is wholly liquidated or formally dissolved, and in Commercial Loan and Trust Co. v. Mallers, 242 Ill. 50, it was held that a banking corporation might do "such acts as may be necessary to collect its debts and settle up its affairs after dissolution." The evidence showed without dispute that the Fidelity Trust & Savings Bank was the owner and holder of one of the bonds in question in the sum of $1,000 and was vested with all the rights given to such owner under the terms of the trust deed.

All the other points made by the defendant challenge the appointment of a receiver. April 16, 1931, the receiver was appointed after due notice to the defendant. No appeal was taken from that order. The decree from which the appeal was taken was entered May 20, 1932; the receiver was not appointed by the decree. It is too late now to question the propriety of the appointment. The right to appeal from an interlocutory order appointing a receiver

hence touching this point is the testimony of a Mr. Anderson, that he was employed in the real estate department of the Uptown State Bank; that the Uptown State Bank assumed the deposit liability of the Fidelity Trust & Savings Bank, "and is now working in connection with the liquidation committee from the Fidelity Trust & Savings Bank in the liquidation of the assets taken over by the Uptown State Bank."

A banking corporation in process of liquidation has power to settle up its affairs, and in dealing with its assets has the same power as an individual would have. There was no evidence that the Fidelity Trust & Savings Bank was in the hands of a receiver, or had surrendered its charter, or had ceased to transact business. The evidence rather shows that it was in process of winding up its business, and having such time certainly a mid-fall upon consideration is not upon any bond or bonds which it might hold. In the old case of Ryan v. Dunlap, 17 Ill. 40, it was held that the charter powers of a bank are continued until it is wholly liquidated or formally dissolved, and in Commercial Loan and Trust Co. v. Mallory, 242 Ill. 80, it was held that a banking corporation might do "such acts as may be necessary to collect its debts and settle up its affairs after dissolution." The evidence showed without dispute that the Fidelity Trust & Savings Bank was the owner and holder of one of the bonds in question in the sum of $1,000 and was vested with all the rights given to such owner under the terms of the trust deed.

All the other points made by the defendant challenge the appointment of a receiver. April 16, 1931, the receiver was appointed after due notice to the defendant. No appeal was taken from that order. The decree from which the appeal was taken was entered May 20, 1932; the receiver was not appointed by the decree. It is too late now to question the propriety of the appointment. The right to appeal from an interlocutory order appointing a receiver

is by virtue of section 123, Practice act, chapter 110. The propriety of the appointment of a receiver must be raised by an appeal from that order and cannot be reviewed on appeal from the final decree. R.C.L. vol. 2, sec. 160; Murray v. Hagmann, 315 Ill. 437; Vandalia v. St. L. V. & T. H. R. R. Co., 209 Ill. 73.

These are the only points presented in defendant's brief, and under Rule 19 of this court a point not contained in the brief shall not be raised afterwards in the printed argument. However, we have considered a point which is touched upon in argument which goes to the merits. Mr. Vander Valk testified that he paid to the Uptown State Bank $3,000, in six installments of $500 each, which was placed in the sinking fund as provided by the provisions of the trust deed; that he made these payments in accordance with an agreement he made with Mr. Wernan, president of the Uptown State Bank, that if such payments were made the principal notes amounting to $7,000, falling due March 15, 1931, would be extended for one year. The evidence as to any such agreement is somewhat uncertain; but in any event there was no proof that Mr. Wernan owned or held any of the bonds which fell due March 15, 1931. Therefore, any agreement to extend their maturity would not be binding upon any of the actual owners of any of the bonds. Neither is there any claim that there was any endorsement made upon the bonds of any agreement to extend, nor any showing that the owners of such bonds authorized an extension. Furthermore, there was no consideration for the alleged agreement to extend, and even if it were made it would have been unenforceable. The payment of $3,000 in installments by defendant into a sinking fund was pursuant to the terms of the trust deed, and was "for the equal protection and security of the bonds and interest coupons secured in said trust deed." The total amount of principal and interest due March 15, 1931, amounted to $9583.75. Obviously, the $3,000 was not sufficient to meet this, and the bank had no authority to apply it on the interest rather than on the principal bonds due. The decree holds specifically that the

is by virtue of section 1328, Practice act, chapter 110. The propriety of the appointment of a receiver must be raised by an appeal from that order and cannot be reviewed on appeal from the final decree. R.S.I. vol. 1, sec. 100; Bailey v. Hagenow, 218 Ill. 437; Vandalia v. St. L. & T. H. R. Co., 208 Ill. 71.

These are the only points presented in defendant's brief, and under Rule 19 of this court a point not contained in the brief shall not be raised otherwise in the printed argument. However, we have considered a point which is touched upon in argument which goes to the merits. Mr. Vander Veer insisted that he paid to the Tyrone State Bank $2,000, in six installments of $300 each, which was placed in the sinking fund as provided by the provisions of the trust deed; that he made these payments in accordance with an agreement he made with Mr. Warner, president of the Tyrone State Bank, that if such payments were made the principal notes amounting to $7,500, falling due March 15, 1931, would be extended for one year. The evidence as to any such agreement is somewhat uncertain; but in any event there was no proof that Mr. Warner owned or held any of the bonds which fell due March 15, 1931. Therefore, any agreement to extend their maturity would not be binding upon any of the actual owners of any of the bonds. Neither is there any claim that there was any endorsement made upon the bonds of any agreement to extend, nor any showing that the owners of such bonds authorized an extension. Furthermore, there was no consideration for the alleged agreement to extend, and even if it were made it would have been unenforceable. The payment of $2,000 in installments by defendant into a sinking fund was pursuant to the terms of the trust deed, and was "for the equal protection and security of the bonds and interest coupons secured in said trust deed." The total amount of principal and interest due March 15, 1931, amounted to $8888.75. Obviously, the $2,000 was not sufficient to meet this, and the bank had no authority to apply it on the interest rather than on the principal bonds due. The decree bears unmistakably that the

Chicago Title & Trust Company as trustee, and the Uptown State Bank as the depository holding said money, were without legal authority to make distribution of said moneys for the payment of said interest coupons without payment of the principal bonds which matured on the same day.

This sinking fund was paid over to the complainant, as trustee, pursuant to the direction of the court, and the decree found that the complainant, pursuant to the provisions of the decree, had applied the amount of this sinking fund in partial satisfaction of the amount due upon the indebtedness.

We can find no reason for sustaining the defendant's contentions, and the decree is therefore affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

Chicago Title & Trust Company as trustee, and the Irvin State Bank as the depository holding said money, were without legal authority to make distribution of said money for the payment of said interest coupons without payment of the principal bonds which matured on the same day.

This sinking fund was paid over to the complainant, as trustee, pursuant to the literalis of the court, and the decree found that the complainant, pursuant to the provisions of the decree, has applied the amount of this sinking fund in partial satisfaction of the amount due upon the indebtedness.

We can find no reason for sustaining the defendant's contentions, and the decree is therefore affirmed.

AFFIRMED.

MACMURRAY and O'Connor, JJ., concur.

36243

JOSEPH KULAK,
appellant,

vs.

JOHN BLAHA, JOSEPHINE BLAHA
and JOHN KESSLER,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

269 I.A. 644

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

The plaintiff appeals from an adverse judgment entered upon two promissory notes signed by defendants, totaling $1,100. The defendant John Kessler was a friend of the other defendants and signed the notes at their request merely as an accommodation. Plaintiff first took judgment by confession; this was vacated and the cause was tried, with the result in favor of defendants; a new trial was granted and upon the second trial the result was the same.

Defendants asserted that they were induced to sign the notes by fraudulent representations. The evidence tended to show that plaintiff was the owner of a grocery business which he offered for sale. Defendants John Blaha and his wife Josephine learned of this and called on plaintiff at his store. Plaintiff represented that the store contained goods to the value of $1,600 to $2,000; that the business was a well established grocery business with an income of $25 to $30 a day during the week and $75 a day on Saturdays and Sundays. Defendants were inexperienced in such matters and looked at the shelves and saw that they appeared to be filled with goods and cans containing goods. Thereupon, relying upon plaintiff's representations, defendants purchased the business with the goods for $2,100, paying $1,000 in cash and giving the two notes for the balance of $1,100.

Shortly after they took possession they discovered that the shelves were largely empty, that the goods and cans were stacked up in front while the backs of the shelves were empty. Defendant

The plaintiff appeals from an adverse judgment entered upon two promissory notes signed by defendants, totaling $1,500. The defendant John Kessler was a friend of the other defendants and signed the notes at their request merely as an accommodation. Plaintiff first took judgment by confession; this was vacated and the cause was tried, with the result in favor of defendants; a new trial was granted and upon the second trial the result was the same.

Defendants asserted that they were induced to sign the notes by fraudulent representations. The evidence tended to show that plaintiff was the owner of a grocery business which he offered for sale. Defendants John Kessler and his wife's father learned of this and called on plaintiff at his store. Plaintiff represented that the store contained goods of the value of $3,000 to $4,000; that the business was a well established grocery business with an income of $40 to $50 a day during the week and $75 a day on Saturdays and Sundays. Defendants were interested in such matters and looked at the invoices and saw that they appeared to be filled with goods and some containing goods. Thereupon, relying upon plaintiff's representations, defendants proceeded the business with the goods for $2,500, paying $1,000 in cash and giving the two notes for the balance of $1,500.

Shortly after they took possession they discovered that the invoices were largely empty, that the goods had been shipped on in first while the books of the invoices were empty. Defendant

Blaha and his wife took an inventory, and he testified that they found only $300 worth of goods on the shelves; instead of the $25 to $30 a day, as represented by plaintiff, defendants took in not to exceed $3 a day; this was mostly for ice cream and candy from the children of the neighborhood; there was no grocery business at all. Defendants told plaintiff they had been swindled and asked him to take the store back, which he refused to do.

Representations that a business is bringing in a certain amount daily, if false, entitles the vendee upon discovery of the facts to a rescission of the contract. Douthit v. Swiney, 310 Ill. 180; Bavarian Brewing Co. v. Farrar, 168 Ill. 471; Hicks v. Stevens, 121 Ill. 186; Allin v. Millison, 72 Ill. 201. Or he may stand by the bargain after he has discovered the fraud and recover damages; or recoup in damages if sued by the vendor. Allen v. Senn, 197 Ill. 486.

The trial court saw the witnesses and heard them testify and could properly find that the execution of the notes was induced by the fraudulent representations of the plaintiff and that such fraud was sufficient to defeat the action of plaintiff.

Kuska v. Vankat, 341 Ill. 358, is not applicable. There the seller, an experienced butcher, represented that he was making $700 a month in the business. The court said that the business depended entirely upon the ability of the vendor as a butcher, and the fact that the vendee was not as skillful as the vendor and could not realize as much did not prove that the vendor had falsely represented the amount he was making.

Two trials have produced the same result. We would not be justified in reversing even on more substantial grounds than presented by plaintiff. The judgment is therefore affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

Hamm and his wife took an inventory, and he testified that they found only $300 worth of goods on the shelves; instead of the $[illegible] to $[illegible] a day, as represented by plaintiff, defendants took in not to exceed $[illegible] a day; this was mostly for gas cream and candy from the children of the neighborhood; there was no grocery business at all. Defendants told plaintiff they had been swindled and asked him to take the store back, which he refused to do.

Misrepresentations that a business is bringing in a certain amount daily, if false, entitle the vendee upon discovery of the fact to a rescission of the contract. Dunbar v. Wilson, [illegible] Ill. [illegible]; Burgess Brewing Co. v. Carter, [illegible] Ill. [illegible]; Ellis v. Jiranek, [illegible] Ill. [illegible]; Mills v. Williams, [illegible] Ill. [illegible]. If so, he may elect to the bargain after he has discovered the fraud and recover damages; or rescind in damages if sued by the vendor. Allen v. Hunt, 197 Ill. 488.

The trial court saw the witnesses and heard them testify and could properly find that the execution of the notes was induced by the fraudulent representations of the plaintiff and that such fraud was sufficient to defeat the action of plaintiff.

Kanne v. Yunker, 201 Ill. 290, is not applicable. There the seller, an experienced baker, testified that he had been making $700 a month in the business. The court said that the business depended entirely upon the ability of the vendor as a baker, and the fact that the vendee was not as skillful as the vendor and could not realize as much did not prove that the vendor had falsely represented the amount he was making.

The trials have produced the same result. We would not be justified in reversing even on more substantial grounds than presented by plaintiff. The judgment is therefore affirmed.

AFFIRMED.

Baldwin and O'Connor, JJ., concur.

36272

ERNEST HARDY, Administrator of the Estate of Pearl Hardy, Deceased,
Appellee,

vs.

METROPOLITAN LIFE INSURANCE CO., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

269 I.A. 644

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $743 entered upon the finding of the court in an action brought to recover upon two life insurance policies issued by it upon the life of Pearl Hardy - one for $275 issued in 1924, the other for $450 issued in 1925; she died December 28, 1930; the policies were in full force and effect at the time of her death. Defendant asserted that it had already paid the amount due on the policies; plaintiff replies that if this is so, defendant improperly paid the amount to the wrong person - in fact, a fictitious person, pursuant to a scheme of the defendant's agent to procure part or all of the proceeds of the policies for himself.

Pearl Hardy was the wife of Ernest Hardy, administrator here; for over a year before her death she was ill and her husband was unemployed; they turned over the policies to a Mr. Frank Williams, the clergyman of the church to which they belonged, requesting him to pay the premiums on the policies, amounting to seventy-five cents a week, with the promise that when she got well she would refund the money. Mr. Williams testified that he undertook to carry out Mrs. Hardy's wishes; that he made payments of premiums for about eighteen months, until her death. Mr. and Mrs. Williams testified that they knew Mr. Joseph Merrick, an agent of the defendant, as he collected insurance premiums from Mrs. Williams upon a policy issued upon her life; that shortly before

[illegible]

ARTHUR LEWIS, Administrator of
the Estate of Pearl Hardy, Deceased,
Appellee.

vs.

METROPOLITAN LIFE INSURANCE CO.,
a Corporation,
Appellant.

APPEAL FROM DECISION
COURT OF CHANCERY.

64. Practice: Motion to Dismiss
Evidence: Not objected to at the trial.

Defendant appeals from a judgment for $743 entered upon the finding of the court in an action brought to recover upon two life insurance policies issued by it upon the life of Pearl Hardy - one for $375 issued in 1924, the other for $400 issued in 1925; she died December 20, 1930; the policies were in full force and effect at the time of her death. Defendant admitted that it had already paid the amount due on the policies; plaintiff replied that it was in no, defendant improperly paid the amount to the young person - in fact, a fictitious person, pretended to be a relative of the defendant's among to procure part or all of the proceeds of the policies for himself.

Pearl Hardy was the wife of Lemuel Hardy, administrator; for over a year before her death she was ill and her husband was unemployed; they turned over the policies to a Mr. Frank Williams, the employee of the owners to which they belonged, ostensibly him to pay the premiums on the policies, amounting to weekly-five cents a week, with the promise that when she got well she would refund the money. Mr. Williams testified that he undertook to carry out his, Hardy's wishes; that he made payments of premiums for which [illegible] [illegible]. [illegible] Williams testified that they were [illegible] [illegible] Dr. defendant, is an efficient insurance [illegible].

Williams was a [illegible] based upon her life; [illegible] before

Mrs. Hardy's death they gave the Hardy policies to Mr. Merrick for the purpose of collecting some "dividends"; that after Mrs. Hardy's death Mr. Merrick told them he could not do anything about the policies. Merrick denied that they gave him the policies.

The policies contain a provision that the company might make payment to the insured, husband or wife, "or any relative by blood or connection by marriage of the Insured, or to any other person appearing to said Company to be equitably entitled to the same by reason of having incurred expense on behalf of the Insured, or for his or her burial. *"

Mark Boyar was the assistant manager of the defendant company at the office on East Forty-seventh street, Chicago; he says that on or about January 15, 1931, a woman came to the office to file a claim on the Hardy policies; that he filled out the claim for her; that she gave her name as Emma Evans Williams, her age as 58; the claim stated that she was the mother of the deceased Pearl Hardy; that the deceased left two brothers, Richard Evans and John Evans, and one sister, Mrs. Emma White; the woman signed the claim "Emma Evans Williams, Residence 2968 Dearborn Street." Mr. Boyar further testified that the defendant's check for $743, representing the death benefits on the policies, was issued payable to the order of Emma Evans Williams, and that he assisted her in having it cashed by a Mr. Johnican, an undertaker whose establishment was nearby. Upon the trial Boyar identified Mrs. Myra Williams, the wife of Mr. Frank Williams, as the woman for whom he filled out the claim and to whom he gave the money; he admitted that Mrs. Williams did not appear to be 58 years of age, the age of the woman who signed the claim. Mrs. Williams denied that she was the woman or had received any money on the policies. As Mrs. Hardy was approximately forty-two years of age at the time of her death and Mrs.

Mrs. Hardy's death they gave the hardy policies to Mr. Hartwick for the purpose of delivering some "Williams"; that after Mrs. Hardy's death Mr. Hartwick told them he could not do anything about the policies. Witness denies that they gave him the policies.

The policies contain a provision that the company may make payment to the insured, husband or wife, "or may relative by blood or connection by marriage of the insured, or to any other person supposing to said Company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his or her burial. "

Each bears the signature of the defendant secretary at the office on West 42-second street, Chicago; he says that on or about January 12, 1921, a woman came to the office to file a claim on the Hardy policies; that he filled out the claim for her; that she gave her name as Anna Williams, her age as 58; the claim stated that she was the mother of the deceased Fred Hardy; that the deceased left two brothers, Richard Evans and John Evans, and one sister, Mrs. Emma White; the woman signed the claim "Anna Evans Williams, Darlington 1928 Southern street." Mr. Joyce further testified that the defendant's check for $762, representing the death benefits on the policies, was issued payable to the order of Anna Evans Williams, and that he assisted her in having it cashed by a Mr. Johnson, an undertaker where entertainment was nearby. Upon the trial Joyce identified Mrs. Ayra Williams, the wife of Mr. Frank Williams, as the woman for whom he filled out the claim and to whom he gave the money; he admitted that Mrs. Williams did not appear to be 58 years of age, the age of the woman who signed the claim. Mrs. Williams denied that she was the woman or had received any money on the policies. In Mrs. Hardy was approximately forty-two years of age at the time of her death and Mrs.

Williams under forty at this time, it is scarcely credible that she would attempt to pass herself off as the mother of Mrs. Hardy.

Mr. Johnican testified that when he cashed the check for Mr. Boyar there was a woman with him; being asked as to whether Mrs. Williams, present at the trial, was the woman, he could not say. He says he gave the money to Mr. Boyar and does not know what he did with it. The trial court required Mrs. Myra Williams to sign her name three times on a sheet of paper, and then the name "Emma Evans Williams" three times. Mr. Rounds, a specialist in examining disputed handwritings, testified that the signature of Emma Evans Williams on the claim of loss and upon the check were written by the same person, and that the person who wrote the six signatures (those written by Myra Williams) did not write any of the other signatures or indorsements. Mrs. Emma White testified that she was the mother of Pearl Hardy; that her home was 2940 South Evans avenue; that Pearl Hardy lived there until her death and that she received no money on the policies. It is not without significance that the witness Boyar had, about a year and a half prior to this time, been arrested for an alleged theft of the proceeds of another policy issued to an "Emma Williams." In the claim for loss is the averment that the claimant, "Emma Evans Williams," had paid or become liable for the costs of the burial, and that the "total undertaker's charges" were $400. The evidence shows without contradiction that all these expenses were paid through another agency. The claim also gave the name of two fictitious brothers of the deceased, named Evans, and a fictitious sister named Emma White. These and other circumstances appearing in evidence could properly convince the trial court that Boyar, through a fictitious beneficiary, procured the payment of the policies to a person not entitled to receive it.

Defendant argues that no proofs of the death of the insured

Williams under forty at this time, it is scarcely credible that she would attempt to pass herself off as the mother of Mrs. Harvey.

Mr. Johnston testified that when he asked the clerk for Mr. Loyer there was a woman with him; being asked as to whether Mrs. Williams, present, is the lady, she said "yes", he could not say. He says he gave the money to Mr. Loyer and does not know what he did with it. The trial court rejected Mrs. Ayra Williams to sign her name three times on a sheet of paper, and then the name "Jane Jones Williams" three times. Mr. Kimmig, a specialist in examining disputed handwritings, testified that the signature of Emma Jones Williams on the claim of loss and upon the check were written by the same person, and that the person who wrote the six signatures (those written by Ayra Williams) did not write any of the other signatures or instruments. Mrs. Emma White testified that she was the mother of Pearl Hardy; that her home was that death house where; that Pearl lived there until her death and that she received no money on the policies. It is not without significance that the witness Loyer had, three years and a half prior to this time, been arrested for an alleged theft of the proceeds of another policy issued to an "Emma Williams." In the claim for loss in the instant case the claimant, "Emma Jones Williams," had paid or become liable for the costs of the burial, and that the "total undertaker's charges" were $400. The evidence shows without contradiction that all these expenses were paid through another agency. The claim also gave the name of two fictitious brothers of the deceased, named Bruce, and a fictitious sister named Emma White. These and other circumstances consisting in evidence could properly convince the trial court that Loyer, through a fictitious beneficiary, procured the payment of the policies to a person not entitled to receive it. Defendant argues that no proofs of the death of the insure

were made upon the blanks as required in the policy. As we have seen, claims were filled out by Mr. Boyer, defendant's assistant manager, and were examined and approved by him; subsequently, Ernest Hardy went to defendant's office and talked with Mr. Merrick "and made the claim;" not receiving any reply, he employed an attorney to investigate the matter; subsequently, Mrs. White, the deceased's mother, went with an attorney to defendant's office and was told that the insurance had already been paid, and the attorney told them that they had paid it to the wrong person; that Mrs. White was the mother.

We are of the opinion that the claim made out by Boyer and inspected and filed by the defendant company, was, in effect a waiver by defendant of the necessity of filing other proofs of death. Defendant has taken the position that sufficient proofs of death were made. It should not now be permitted to claim that other proofs must be made. There is no contention that Ernest Hardy, the widower of the deceased and her legal heir, is not entitled to recover under the provisions of the policy if the loss has not been paid to a proper party. It was solely by the negligence, or the wrongful acts of defendant's agent, that plaintiff was denied the right to collect the insurance.

We see no reason to disagree with the conclusion of the trial court, and the judgment is affirmed.

AFFIRMED.

Hatchett and O'Connor, JJ., concur.

more made upon the plaintiff to required in the policy. As no have been, claims were filing out by in. Hence, defendant's maintenance manager, not were received not approved by that [illegible],

Great Court [illegible] is defendant's office and United with in. Hearing "and made the claim;" not receiving any reply, he employed an attorney to investigate the matter; subsequently, Mr. Allin, the defendant's manager, said that an attorney in defendant's office and was told that the insurance had already been paid, and the attorney into [illegible] [illegible] the [illegible] patent; [illegible] Allin was the mother.

[illegible] of the opinion that the claim made out by Hayes and Impossible and filed by the [illegible] company, and, in action a matter by the [illegible] of the beneficiary of filing other proofs of death. Defendant has taken the position that sufficient proofs of death were made. It should not now be permitted to claim that other proofs must be made. There is no condition that proofs Death, the widower of the deceased and her legal heir, is not sufficient to recover under the provisions of the policy if the loss has not been paid to a proper party. It was claimed by the beneficiary, or the [illegible] [illegible] of defendant's [illegible], that plaintiff was denied the right to deliver the insurance.

We see no reason to disagree with the conclusion of the trial court, and the judgment is affirmed.

AFFIRMED.

Davidson and Dunbar, JJ., concur.

36321

MAX THOREK,
Appellee,

vs.

UNION INDEMNITY COMPANY,
a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

34 47

269 I.A. 644

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on a bond issued by defendant to secure a note for $35,000 signed by Alexander Flower and Samuel F. Flower, payable to plaintiff, maturing October 1, 1931. Plaintiff declared that the note had not been paid and that defendant was liable upon its bond. Upon trial by the court plaintiff had a finding and judgment for $35,000 and defendant appeals.

There is little, if any, dispute as to the facts. In 1929 plaintiff had loaned Samuel Flower and Alexander Flower $105,000, taking certain securities as collateral, among them a mortgage covering a leasehold; this particular collateral represented $35,000, but plaintiff's attorney advised him that it was not worth so much; plaintiff told his attorney that the Flowers had represented that this mortgage represented a freehold instead of a leasehold; plaintiff's attorney communicated with the Flowers, stating that plaintiff wanted better collateral; the attorney then made complaint to an investigator in the office of the State's Attorney and met the two Flowers there and was told by them that other securities would be substituted for the mortgage on the leasehold; they offered real estate bonds to be substituted but these were refused; they asked whether their note with a surety bond would be accepted by plaintiff and were told that if they would get a bond of the Union Indemnity Company, the defendant here, that plaintiff would accept it. A form of bond was submitted, and subsequently the

[illegible]

[illegible] Appellee,

vs.

UNION INDEMNITY COMPANY,
a Corporation,
Appellant.

[illegible]

[illegible]

[illegible]

EN. PERSIGNE JUSTICE MOUTOUSSAY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on a bond issued by defendant to secure a note for $25,000 signed by Alexander Flower and Emmanuel V. Flower, payable to plaintiff, maturing October 1, 1931. Plaintiff declared that the note had not been paid and that defendant was liable upon its bond. Upon trial by the court plaintiff had a finding and judgment for $25,000 and reasonable expenses.

There is little, if any, dispute as to the facts. In 1929 plaintiff had loaned Emmanuel Flower and Alexander Flower $150,000, taking certain security in collateral, among them a mortgage covering a Jacksonville; this particular collateral represented $15,000, but plaintiff's witnesses stated the real it was not worth so much; plaintiff took the mortgage that the Flowers did propose; plaintiff's attorney recommended a foreclosure instead of a loan; plaintiff's attorney communicated with the Flowers, stating that plaintiff would be satisfied; the attorney then made complaint to an investigator in the office of the State's attorney and met the two Flowers there and was told by them that other creditors would be substituted for the mortgage on the Jacksonville; they offered such notes which to be substituted for those notes payment they asked whether their note with a surety bond would be accepted by plaintiff and were told that if they would get a bond of the Union Indemnity Company, the defendant here, that plaintiff would accept it. A form of bond was submitted, and subsequently the

note and bond in question were delivered to the attorney, who delivered them to plaintiff.

The note is dated July 31, 1929, in which Alexander Flower and Samuel F. Flower promise to pay to the order of Dr. Max Therek on October 1, 1931, $35,000 with interest. The bond, delivered at the same time and which is the basis of this suit, reads as follows:

"Know All Men by These Presents, That We, Alexander Flower and Samuel F. Flower of Chicago, Illinois, as principals, and Union Indemnity Company, a Louisiana Corporation, as surety, are held and firmly bound unto Dr. Max Therek of Chicago, Illinois, in the penal sum of $35,000.00, etc. Dated July 31, 1929.

Whereas, under date of July 31, 1929, a certain promissory note was drawn in the sum of $35,000.00 in favor of Dr. Max Therek, signed by Alexander Flower and Samuel F. Flower, payable October 1, 1931, said note being attached hereto bearing number 1.

Now, Therefore, the condition of the foregoing obligation is such that if the said principals shall well and truly indemnify and hold harmless the said obligee from all loss, costs, or damages which he may sustain by reason of their failure to pay the above described promissory note, by October 1, 1931, then this obligation to be void; otherwise to remain in full force and effect.

****

) (Signed) Alexander Flower
" Samuel F. Flower
Union Indemnity Company
by Timothy E. Dunne (Signed)
Attorney in fact.
(Seal)
Union Indemnity Co.
Incorporated 1919."

The note was not paid at maturity and a written demand was made by plaintiff on the defendant for payment, which was refused, and this suit followed.

Defendant's first point is that the bond refers to a note "attached hereto," but the note introduced in evidence was not attached to the bond. This is not important. It is only required that the note be referred to in the bond in such a way as it can be identified. Bartlett v. Wheeler, 195 Ill. 445; Despres v. Folz, 134 Ill. App. 111; McCullough v. Moore, 111 Ill. App. 545; Naughawout v. Raymond, 148 Cal. 311.

It is next argued that the bond is not an undertaking to pay the note upon the failure of the makers to pay it, but is an under-

note and bond in question were delivered to the attorney, who so-
licited them to plaintiff.

The note is dated July 8, 1917, is made payable to Samuel F. Flower and Samuel F. Flower provides to pay in the order of Dr. Von Tiesek on October 1, 1918, $1,000 with interest. The bond, delivered at the same time and which is the basis of this suit, reads as follows:

"Know All Men by These Presents, That We, Alexander Flower and Samuel F. Flower of Chicago, Illinois, as principals, and Union Indemnity Company, a business corporation, as surety, are held and firmly bound unto Dr. Ben Tiesek of Chicago, Illinois, in the penal sum of $1,000.00, etc. Dated July 8, 1918.

Thereon, under date of July 8, 1918, a surety provisionally was given in the sum of $1,000.00 in favor of Dr. Von Tiesek, signed by Alexander Flower and Samuel F. Flower, principle obligor 1, 1921, said note being attached thereto bearing number 2.

Now, Therefore, the condition of the foregoing obligation is such that if the said principals shall well and truly indemnify and hold harmless the said obligee from all loss, cost, or damages which he may sustain by reason of their failure to pay the above described promissory note, by October 1, 1921, then this obligation to be void; otherwise to remain in full force and effect.

(Sealed) Alexander Flower
Samuel F. Flower
Union Indemnity Company
By Timothy M. Moore (Seal)
Attorney in Fact.
(Seal)
Union Indemnity Co.
Incorporated 1910."

The note was not paid at maturity and a written demand was made by plaintiff on the defendant for payment, which was refused, and this suit followed.

Defendant's first point is that the bond refers to a note "attached hereto," but the note introduced in evidence was not attached to the bond. This is not important. It is only required that the note be referred to in the bond in such a way as to be identified. Tarkington v. Thurber, 108 Ill. App. 1; Sweetser v. Lair, 111 Ill. App. 111; Commercial v. Bailey, 111 Ill. App. 218; Independent v. Samson, 128 Ill. 173.

It is also argued that the bond is not an obligation to pay the note upon the failure of the makers to pay it, but is an unter-

taking to indemnify the obligee against loss after he has made a reasonable effort to collect it without success. The obligation of the bond is to "well and truly indemnify and hold harmless the said obligee from all loss, costs, or damages which he may sustain by reason of the failure of Alexander Flower and Samuel F. Flower to pay the above described promissory note, by October 1, 1931."

Contracts of guaranty of negotiable instruments may be contracts guaranteeing the collection of notes and contracts guaranteeing the payment of notes. The first kind is a guaranty conditional in its character, the condition being that the owner of the note shall use ordinary legal means to collect it, but without avail. Beebe v. Kirkpatrick, 321 Ill. 618. Defendant cites numerous cases which it is said support the claim that the guaranty in question is of this conditional character. The only case in this State presented is Blaisdell v. Voightmann et al., 211 Ill. App. 492, where the language of the bond was construed to be of this kind. By the bond there considered, the surety agreed to indemnify the obligee "from all actions, suits, costs, charges, demands, loss and expenses whatsoever (including attorney's fees.)" This language might reasonably be construed as a guaranty conditioned upon an attempt to collect. In the instant case the obligation was to indemnify from "loss, costs, or damages," by October 1, 1931.

It is a well established rule of construction that where the meaning of an instrument is uncertain, the construction which the parties themselves have placed upon the instrument will prevail. On August 13, 1929, evidently pursuant to a request from the Union Indemnity Company, Alexander Flower and Samuel F. Flower, the principals in the bond, wrote to the Indemnity Company that:

"In consideration of the Surety bond given by you to Dr. Max Thorek, guarantying the payment of a $35,000.00 note dated July 31st, 1929, and due October 1st, 1931, we the undersigned, hereby guaranty

failing to indemnify the obligee against loss after he has made a reasonable effort to collect it without success. The obligation of the bond is to "well and truly indemnify and hold harmless the said obligee from all loss, costs, or damages which he may sustain by reason of the failure of Alexander Flower and Samuel R. Flower to pay the above described promissory note, by October 1, 1931."

Contracts of guaranty of negotiable instruments may be conveniently characterized the solicitation of notes and contracts guaranteeing the payment of notes. The first kind is a guaranty conditional on the insolvency, the second being that the issue of the note shall be officially legal which is obscure at, but without avail. Burke v. Lincoln, 2 N.H. 171, 172. Defendant also argues cases which it is said support the claim that the guaranty in question is of this conditional character. The only case in this state presented is Ellicott v. Tolchinson et al., 224 Ill. App. 492, where the language of the bond was construed to be of this kind. By the bond there contained, the surety agreed to indemnify the obligee "from all actions, suits, costs, charges, damages, loss and expenses whatsoever (including attorney's fees.)" This language might reasonably be construed as a guaranty conditioned upon an attempt to collect. In the instant case the obligation was to indemnify from "loss, cost or damage," by October 1, 1931.

It is a well established rule of construction that where the meaning of an instrument is uncertain, the construction which the parties themselves have placed upon the instrument will prevail. On March 13, 1930, evidently pursuant to a request from the Union Indemnity Company, Alexander Flower and Samuel R. Flower, the principals in the bond, wrote to the Indemnity Company:

"In consideration of the surety bond given by you to Mr. Kent Travis, guaranteeing the payment of a $25,000.00 note dated July 31st 1928, due October 1st, 1931, on the mortgaged, subject property

and agree to pay to the order of Dr. Max Thorek, $1,000.00 monthly, starting on the first day of September, 1928, which amount will reduce said bond given by you at the rate of $1,000.00 a month, the entire balance to be paid on October 1st, 1931.

Very truly yours,
Alexander Flower
Samuel F. Flower"

This letter is consistent only with the understanding that the bond was a guaranty of payment. Further, the Merican Trust & Savings Bank wrote to the defendant on August 8, 1930, saying that one of their clients was holding a promissory note "which we understand has been guaranteed by your company." Then follow numbers, names, amount and date, identifying the bond in question. The letter proceeds: "We understand that your guaranty is to the effect that if the said promissory note is not paid by Alexander and Samuel Flower on the date of maturity, that your company has guaranteed the payment thereof. We shall be pleased to have you advise us whether these are the true facts in the situation." To this defendant replied, after giving data identifying the bond and note:

"We have your inquiry of August 8th regarding the above bond which we have executed on behalf of Messrs. Alexander Flower and Samuel F. Flower. This bond was executed in favor of Dr. Max Thorek, Chicago, Illinois, and your understanding of the character of the guarantee is correct."

These communications clearly show that the parties to the bond intended and understood it to be a guaranty of payment.

Upon the trial counsel for plaintiff questioned a witness, Samuel Flower, as to the financial worth of the Flowers on October 1, 1931, the day the note matured. Upon objection by defendant's counsel plaintiff explained that while he had taken the position that the bond was a guaranty of payment, yet, in view of the fact that counsel for defendant had insisted that it was a guaranty of collection only, counsel for plaintiff wished to develop that the makers of the note had no property or assets out of which collection of the note could have been made. Defendant's objection to this line of testimony was sustained. Defendant's position on the trial

and agree to pay in the order of Mr. Ben Carver, $[illegible] monthly, starting on the first day of September, 1930, which amounts will re- duce said note given by you at the rate of $[illegible] a month, the entire balance is paid on October 1st, 1933.

Very truly yours,

Alexander Stone

Samuel I. Kleser"

This letter is consistent only with the understanding that the note was a guaranty of payment. Moreover, the district court certainly took wrong to the defendant on August 6, 1930, saying that one of their clients was holding a promissory note "which we understand has been guaranteed by your company." Then follow numbers, amount and date, identifying the note in question. The letter proceeds: "We understand that your guaranty is in the effect that if the said promissory note is not paid by Alexander and Samuel Klaser on the date of maturity, that your company has guaranteed the payment thereof. We shall be pleased to have you advise us whether these are the true facts in the situation." To this defendant replied, after giving back identifying the note and date:

"We have your inquiry of August 6th regarding the above note, which we have examined on behalf of Ben Carver, Alexander Stone and Samuel I. Klaser. This note was executed in Troy of Mr. Ben Carver, Chicago, Illinois, and your understanding of the transaction of the guaranty is correct."

These communications clearly show that the parties to the suit intended and understood it to be a guaranty of payment.

Upon the trial counsel for plaintiff questioned a witness, Samuel Klaser, as to the financial worth of Ben Carver on October 1, 1930, the day the note matured. Upon objection by defendant's counsel plaintiff explained that while he had taken the position that the note was a guaranty of payment, yet, in view of the fact that counsel for defendant had testified that it was a guaranty of collection only, counsel for plaintiff wished to develop the fact the maker of the note had no property or means out of which collection of the note could have been made. Defendant's objection to this line of inquiry was sustained. Defendant's position on the trial

apparently was that evidence as to the uncollectability of the note was incompetent. It cannot now be heard to assert that the bond was conditional upon an attempt to collect the note.

Defendant offered in evidence a certified copy of its charter for the purpose of showing that the execution of the bond was ultra virus the corporation. The court sustained an objection to this evidence. We think it should have been admitted, and as it is in the record we have examined it for the purpose of determining the charter powers of the defendant. Among other things the defendant was given authority "to guarantee the performance of contracts other than insurance policies." That the word "contract" includes a promissory note must be conceded. In National Surety Co. v. Lanham, 129 Md. 542, the court had under consideration facts involving a bond given to guarantee the payment of a note. It was argued that in construing the power given by the use of the word "contract," this word should not be taken in its broad legal sense but should be confined to a narrower meaning, and that unless the charter contained express words giving power to guarantee promissory notes for the payment of money, then the power should not be read into the charter by simply expressing the power as one to guarantee contracts generally. The court declined to follow this argument, saying:

> "While it is true that special authority must be conferred, by its charter, before any corporation can become the surety on any bond, yet we know of no rule of law, nor any reason for such, that would require a narrower meaning to be attached to words covering a grant of power than the words used necessarily imply, provided, of course, that the power assumed to be exercised is a lawful one.
>
> "The very nature of the business for which the appellant was chartered is that of becoming surety for a great variety of classes of suretyship, and the character of suretyship herein claimed is neither unlawful nor against public policy."

Defendant is in the surety business for profit. It received a premium of $525 for the instant bond. It is essentially an insurance risk underwritten for a money consideration, and therefore the contract will be construed most strongly against the defendant.

apparently was that evidence as to the unpleasantness of the note was immaterial. It cannot now be heard to assert that the bond was conditioned upon an attempt to collect the note.

In

Defendant alleges a material loss of its surety for the purpose of showing that the execution of the bond was *ultra vires* the corporation. The court sustained an objection to this evidence. We think it should have been admitted, and as it is in the record we have examined it for the purpose of determining the surety owners of the defendant. Among other things the defendant was given authority "to guarantee the performance of contracts other insurance policies." That the word "contract" includes a promissory note must be conceded. In *National Surety Co. v. Lambert*, 130 Ma. 324, the court had under consideration facts involving a bond given to guarantee the payment of a note. It was argued that in conferring the power (even by the use of the word "contract," this word should not be taken in its broad legal sense but should be confined to a narrower meaning, and that unless the surety com- pany entered into a contract to guarantee performance of the payment of money, then the power should not be read into the charter by simply authorizing the power to do to guarantee contracts generally. The court declined to follow this argument, saying:

"While it is true that special authority must be conferred, by its charter, before any corporation can become the surety on any bond, yet we know of no rule of law, nor any reason for such, that would require a charter granting to be attached to words authorizing a grant of power than the words used necessarily imply, providing, of course, that the power assumed to be conferred is a lawful one.

"The very nature of the business for which the appellant was incorporated is that of furnishing surety for a great variety of clauses of contracts, and the character of enterprise herein claimed is neither unlawful nor against public policy."

Defendant is in the surety business for profit. It received a premium of $225 for the instant bond. It is essentially an insur- ance risk underwritten for a money consideration, and therefore the contract will be construed most favorably against the defendant.

American Surety Co. v. Pauly, 170 U. S. 133; Lesher v. U. S. F. & G. Co., 239 Ill. 502; U. S. F. & G. Co. v. First National Bank, 233 Ill. 475; People v. Ross, 174 Ill. 316; Marks v. Knofsky Co., 233 Ill. App. 293. In Spencer on Suretyship, page 124, the author says:

"All ambiguities in the language used being resolved in favor of the beneficiary so long as violence is not done to the plain and palpable meaning of the words actually employed. In other words, compensated surety companies, unlike the private or friendly surety, cannot invoke the principle strictissimi juris."

In Kellogg v. Havre, 199 Fed. 727, it was held that the doctrine of ultra vires should never be applied when it will defeat the ends of justice, if such a result can be avoided. See also Denecke v. West, 184 Ia. 600. We hold that issuing the bond was within the powers of the defendant.

Defendant sought to introduce evidence tending to show that the Flowers misrepresented their assets and thereby induced the defendant to sign the bond. As counsel admitted they had no evidence that plaintiff had any knowledge of this, the court properly sustained an objection. The negotiations for the bond were between the Flowers and the defendant. The defendant received a premium for executing the bond and accepted collateral security from them to protect itself. If defendant unwisely relied upon their representations, it has only itself to blame and cannot question the rights of plaintiff, who took the bond in good faith. In Ward v. National Surety Co., 167 Mo. App. 579, it was held that the surety was estopped from taking advantage of the fraud of the principal in procuring the bond, the court saying:

"Where the surety is misled by fraudulent misrepresentations of the principal into signing the bond and the obligee innocent of any participation in or knowledge of such fraud receives the bond from the principal to whom the surety has intrusted its delivery, the surety is estopped from relying on the fraud of the principal in an action on the bond and must bear the loss occasioned by such fraud."

In Whittaker v. U. S. F. & G. Co., 300 Fed. 129, the court

Kansas Gazette Co. v. Crane, 170 U. S. 185; Lucas v. A. C. & S. R. Co., 238 III. 309; N. K. F. & S. Co. v. First National Bank, 234 III. 479; Fowler v. Ewen, 172 III. 161; Ewen v. Hastings Co., 232 III. 492. In Spencer on Interpleader, page 124, the author says:

"All modifications in the language used being received in favor of the bailee, or lead us without in not then in the plain and palpable meaning of the words actually employed. In other words, unprecedented merely compelled, unless the private or fiduciary energy, cannot invoke the principle interpleader."

In Gilmore v. Ewen, 188 Fed. 727, it was held that the duties of stake-holder should never be qualified unless it will injure the rule of justice, if such a result can be avoided. See also Fowler v. Ewen, 144 Ia. 600. To hold that leaving the bond was within the power of the defendant.

Defendant sought to introduce evidence tending to show that the flowers misrepresented their assets and thereby induced the defendant to sign the bond. As counsel admitted they had no evidence that plaintiff had any knowledge of this, the court properly sustained an objection. The negotiations for the bond were between the flowers and the defendant. The defendant received a premium for executing the bond and accepted collateral security from them to protect itself. If defendant assumes risks upon their representations, it can only resort to them on account growing out of such activity, was just the bond in question. In Ewen v. National Surety Co., 187 Ky. 400, 777, it was held that the mere fact that the surety was negligent in securing the bond, taking affidavits of the fraud of the principal in procuring the bond, the court said:

"Where the surety is misled by fraudulent misrepresentations of the principal into signing the bond and the obligee thereof, or any participation in or knowledge of such fraud prevents the bond from the principal to whom the surety has intended the delivery, the surety is released from relying on the fraud of the principal, as no action on the bond and must then the bond nonexistent by such fraud."

In Middlebury v. C. S. F. & S. Co., 300 Fed. 130, the court

held that if the surety relied upon the debtor and co-obligor seeking the bond, "it did so at its peril, and is none the less liable that therein the debtor's representations of conditions of the bond may have been affected by fraud or mistake."

The bond was not executed in consideration of a prior existing indebtedness. This was simply a case of a debtor substituting for other collateral the note of the Flowers with defendant's bond as surety as collateral; there was no change in the indebtedness nor release of the debtor. Defendant's counsel have cited a great number of cases touching the sufficiency, as consideration, of a prior existing indebtedness. That question is not involved in this case. There is nothing in the record which questions the transaction by which plaintiff loaned money to the Flowers.

Alexander and Samuel F. Flower were not the agents of plaintiff in procuring the bond. Plaintiff accepted their proposition to substitute their note and the bond for other collateral. He was dealing with them at arms length. There was no agency in the matter.

We cannot agree with the contention that the bond was void because it was obtained as the result of compounding a felony, and by means of duress, and is contrary to public policy. None of these elements were present. Plaintiff was dissatisfied with some of the collateral, and his attorney reported the matter to the State's Attorney; the Flowers were called in and agreed to replace the questioned collateral with acceptable collateral; there was no difficulty in the matter, no threats of a criminal prosecution nor arrests. Compounding a felony is based upon an express or implied promise not to prosecute for a criminal offense. Here acceptance of money for a personal obligation is not compounding a crime. Ford v. Gratty, 52 Ill. 513; Hertel v. Rebhan, 264 Ill.

each case if the surety relied upon the bond as a valid insurance bond, "it did so at its peril, and is open to the less plausible that therein the doctor's representations of condition of the bond may have been affected by fraud or mistake."

The bond was not executed in consideration of a prior existing indebtedness. This was clearly a case of a direct advancing for other collateral the note of the flowers with defendant's bond as surety as collateral; there was no change in the indebtedness nor release of the doctor. Defendant's counsel have cited a great number of cases touching the sufficiency, as consideration, of a prior existing indebtedness. That question is not involved in this case. There is nothing in the record which questions the transaction by which plaintiff loaned money to the flower.

Alexander and Samuel F. Flower were not the agents of plaintiff in procuring the bond. Plaintiff accepted their proposition to substitute their note and the bond for other collateral. He was dealing with them at arms length. There was no agency in the matter.

We cannot agree with the contention that the bond was void because it was obtained as the result of compounding a felony, and by means of duress, and is contrary to public policy. Some of these elements were present. Plaintiff was dissatisfied with some of the collateral, and his attorney reported the matter to the State's Attorney; the flowers were called in and agreed to replace the questioned collateral with acceptable collateral; there was no difficulty in the matter, no threats of a criminal prosecution nor arrests. Compounding a felony is based upon an express or implied promise not to prosecute for a criminal offense. Here acceptance of money for a personal obligation is not compounding a crime. Just v. Grubb, 64 Fed. 324; Barton v. Dering, 181 Ill.

App. 548; Section 112 Criminal Code, Illinois Statutes (Cahill.) The claim that the bond was executed under duress is wholly without support.

Complaint is made of the rulings of the trial court upon the admissibility of evidence, and it is said that the court participated too freely in the trial of the case. Even if there were errors in the record, nothing is presented of sufficient importance to require a reversal, especially when the court arrived at the only conclusion which was justified by the evidence.

We have not attempted to comment on the cases cited in great number by able counsel for the defendant. To do so would have compelled us to violate the statutory requirement that our opinions shall "briefly" give the reasons for our decision. Paragraph 49, Chapter 37, Illinois Statutes (Cahill.)

Nothing appears which would justify a reversal, and the judgment is therefore affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

Act, 848; Section 112 Criminal Code, Illinois Statutes (Smith.)
The claim that the bond was executed under duress is wholly without merit.

Complaint is made of the failure of the trial court upon the admissibility of evidence, and it is said that the court participated too freely in the trial of the case. Even if there were errors in the record, nothing is presented of sufficient importance to require a reversal, especially when the court arrived at the only conclusion which was justified by the evidence.

We have not attempted to comment on the cases cited in great number by both counsel for the defendant. To do so would have compelled us to violate the statutory requirement that our opinions shall "briefly" give the reasons for our decisions. Paragraph 84, Chapter 37, Illinois Statutes (Smith.)

Nothing appears which would justify a reversal, and the judgment is therefore affirmed.

AFFIRMED.

Bailey and O'Connor, JJ., concur.

36352

SAM HOFFMAN,
Appellee,

vs.

SEARS-COMMUNITY STATE BANK, a Corporation, (as successor by consolidation or merger to COMMUNITY STATE BANK, a Corporation),
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

357

269 I.A. 644

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of $2976.87 entered upon the findings of the court in an action wherein plaintiff claims that defendant was obligated to repurchase certain real estate bonds sold to plaintiff, which obligation the defendant refused to perform.

Plaintiff's dealings originally were with the Community State Bank, afterward consolidated with the defendant, Sears Community State Bank. July 28, 1926, plaintiff had a conversation with Mr. Max Shulman, president of the Community State Bank, and Mr. E. L. Zinder, its cashier, in which they recommended that plaintiff purchase certain bonds, secured by trust deed on real estate, and when plaintiff inquired whether the bonds were good both Shulman and Zinder offered to secure the bonds in writing; thereupon plaintiff said, "I am satisfied if you will give me a writing, because I might need the money in a short time and I want to be sure that I get my money." Pursuant to this verbal agreement plaintiff purchased three bonds for $1,000 each and received a written agreement from the bank, saying:

"We will repurchase these bonds at any time at 99 and pay you 5% interest on your investment the coupons to belong to us.
(Signed) E. L. Zinder, Cashier."

The bonds matured May 1, 1932, secured by deed of trust conveying certain real estate with improvements, in Chicago, to Max Shulman as trustee. Plaintiff collected interest on these, including interest which fell due May 1, 1931, after which date no interest was paid.

[illegible]

Atlanta.

To,

[illegible]
[illegible]
[illegible]

The Community State Bank was consolidated with the Sears-Community State Bank July 3, 1931. August, 1931, plaintiff called at the defendant bank, interviewed the assistant cashier and handed him the bonds, with the request that the bank repurchase them according to the agreement; the assistant cashier took plaintiff to interview Mr. Kohn, president of the Sears-Community State Bank, and was told by him that the bank could not buy back the bonds; two days later plaintiff called upon Mr. Shulman and was told that he, Mr. Shulman, would take the matter up with the bank and would let plaintiff know as to the result; plaintiff never heard anything further from him. January 7, 1932, plaintiff sent a letter addressed to the defendant bank "as successor by consolidation or merger with the Community State Bank," making a formal tender of the bonds with the request that they be repurchased in accordance with the written agreement. This was refused and plaintiff brought this action.

Defendant's brief fails to observe Rule 19 of this court. We find no statement of facts although there is a plethora of legal propositions indicating extraordinary diligence on the part of counsel. Defendant really is attempting to obtain a reconsideration of prior opinions of this court. We are not convinced that these cases were wrongfully decided. The facts in this case are controlled by our opinions in Freedman v. Madison & Kedzie State Bank, 259 Ill. App. 519, in which case the Supreme court denied certiorari; Madison-Kedzie Trust & Savings Bank v. Dean, 263 Ill. App. 646; Awotin v. Atlas Exchange Nat'l Bank, 265 Ill. App. 238; and the recent opinion in this court in Knass v. Madison & Kedzie State Bank, No. 36033, opinion filed December 28, 1932.

Defendant says that Section 4 of the act entitled "An Act for the Protection of Bank Depositors," Chapter 38, Illinois Statutes was not called to our attention in these cases, but this was called

The Community State Bank was consolidated with the Sparta-Community State Bank July 2, 1931. August, 1931, plaintiff called at the defendant bank, interviewed the president cashier and handed his pass-book, with the payment that the bank transferred this amount according to the agreement; the president cashier told plaintiff to interview Mr. Kuhn, president of the Sparta-Community State Bank, and was told by him that the bank could not buy back the bonds; two days later plaintiff called upon Mr. Shulman and was told that he, Mr. Shulman, could take the matter up with the bank and could let plaintiff know in the result; plaintiff never heard anything further from him. January 7, 1932, plaintiff sent a letter addressed to the defendant bank "as successor by consolidation or merger with the Community State Bank," making a formal tender of his bonds with the request that they be repurchased in accordance with the written agreement. This was refused and plaintiff brought this action.

Defendant's brief fails to observe Rule 20 of this court. To find no statement of facts although there is a plethora of legal propositions indicating extraordinary diligence on the part of counsel. Defendant really is attempting to obtain a reconsideration of prior opinions of this court. We are not convinced that these cases were wrongfully decided. The facts in this case are controlled by our opinions in Krayenbuhl v. Fullerton & Dahlin State Bank, 204 Ill. App. 310, in which case the decision more fully interpreted: Dahlin Dahlin Trust & Savings Bank v. Sims, 265 Ill. App. 461; Martin v. Allen Shoemaker Trust Bank, 265 Ill. App. 329; and the recent opinion in this court in Tuohy v. Fullerton & Dahlin State Bank, No. 6005, opinion filed December 22, 1932.

Defendant says that Section 4 of the act entitled "An Act for the formation of Bank Companies," October 22, Illinois Stats. was not called to our attention in these cases, but this was called

to the attention of the Supreme court in the petition for the writ of certiorari in the Freedman case, supra, and was also considered in our opinion in Kaase v. Madison & Kedzie State Bank.

Defendant says the case of Murray v. Standard Pecan Co., 309 Ill. 226, has not been called to our attention. The decision in that case rested solely upon the fact that the agent of the vendor was a special agent with specified limited powers, namely, to sell stock, and that the vendor did not ratify the acts of the agent in excess of his authority, of which it had no notice. Defendant presents a recent decision in Hawkins Realty Co. v. Hawkins State Bank, 205 Wis. 106. In this case the plaintiff was a corporation organized by the heirs of G. E. Ellingson to handle certain properties belonging to him; Ellingson was president, director, and the largest stockholder of the defendant bank, and exercised influence over Vig, the cashier; Ellingson, for his own personal use, picked from the list of mortgages held by the bank the best the bank had and entered into a secret agreement with the cashier, whereby the bank agreed to repurchase the same. The court held that under the circumstances such an agreement was contrary to sound public policy. We see no reason to depart from the conclusion reached in the cases decided by this court and cited above.

It should be noted that in the instant case the agreement to repurchase the bonds from plaintiff was in fact made by the president and the cashier, so that the bank ratified this agreement. Bloom v. Vehon Co., 341 Ill. 200; Quigley v. Macqueen & Co., 321 Ill. 124; Peoria Life Ins. Co., v. International Life & Annuity Co., 246 Ill. App. 38.

It is argued that the demand for repurchase must be made within a reasonable time, and plaintiff replies that it is sufficient to make a demand for repurchase within the limits of the

in the absence of the Supreme Court in the petition for the writ of certiorari in the Ziegelman case, supra, and was also considered in our decision in Tyler v. Atlanta & Pacific Club.

Defendant says the case of Mutual v. Hendrix, 1 Ga. App. 111, 108, has not been called to our attention. The decision in that case rested solely upon the fact that the agent of the vendor was a special agent with specifies limited powers, namely, to sell stock, and that the vendor did not ratify the acts of his agent in excess of his authority, or which it had no notice. The Federal Supreme Court recently decided in Southern Realty Co. v. Lowndes Hills Club, 285 U.S. 204. In this case the liability was a mortgage given originated by the heirs of C. E. Hillegass in Bucks County, Pennsylvania belonging to him; Hillegass was president, director, and the largest stockholder of the defendant Club, and conveyed intimate over 75%, the member; Hillegass, for his own personal use; picked from the list of Pottsville and by the Club the best the bad but without like a legal agreement with the entire, merely the Club agreed to reimburse the same. The court held that under corporations act in Pennsylvania was unlawful to make loans to officers. We see no reason to depart from the conclusion reached in the case decided by this court and cited above.

It should be noted that in the instant case the agreement to repurchase the Bucks Farm Plantation was in fact made by the president and the auditor, at that the Bank participated into agreement. Pilgrim v. Tybee Co., 141 Ga. 671; Dunlap v. Sanderson & Co., 121 Ga. 124; Equity Life Ins. Co. v. International Life & Casualty Co., 156 Ga. App. 22.

It is argued that the demand for repurchase must be made within a reasonable time, and plaintiff contends that it is entitled to have a jury for determination which the limits of the

Statute of Limitations. We do not think this point is important. By the contract the bank agreed to repurchase "at any time." Demand was first made in 1931 and repeated in 1932, before the bonds matured. This was a sufficient compliance with the condition which imposed on the bank the obligation to repurchase.

It is said that plaintiff, who availed himself of the privilege of compelling the bank to repurchase, must return what he had received; that the contract specifically provides, "the coupons to belong to us," and that when plaintiff tendered the bonds without the coupons representing the interest for the first four years, which had been paid, plaintiff failed to tender the exact paper he had purchased. This point has no merit. Manifestly, the provision that the coupons should belong to the bank in the event of a repurchase means such coupons as had not then been paid.

Both counsel indulge in much argument over the rulings of the trial court with reference to propositions of law. If the trial court rendered a correct judgment, this court will affirm regardless of any errors that may have been made with reference to propositions of law submitted. P. C. C. & St. L. Ry. Co. v. Chicago Ry., 300 Ill. 162; Village of Atwood v. Otter, 296 Ill. 70; North Chicago City Ry. Co. v. Town of Lake View, 105 Ill. 207; Weber v. Krueger, 202 Ill. App. 87.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

statute of limitations. We do not think this point is important. By the contract the bank agreed to repurchase "at my idea." Counsel was first made in 1932 and repeated in 1933, before the bank was sued. This was a sufficient compliance with the conditions which imposed on the bank the obligation to repurchase.

If in fact that plaintiff, the vendee herein at the price of cancelling the bank to repurchase, must return what he had received; that the contract specifically provides, "the coupons to belong to us," and that when plaintiff tendered the bonds without the coupons representing the interest for the first four years, which had been paid, plaintiff failed to tender the exact paper he had purchased. This point has no merit. Similarly, the provision that the coupons should belong to the bank in the event of a repurchase means such coupons as had not then been paid.

Both counsel indulge in much argument over the rulings of the trial court with reference to propositions of law. If the trial court reached a correct judgment, this court will affirm regardless of any errors that may have been made with reference to propositions of law admitted. V. S. C. A. Ch. 1, Sec. 2, Gilmore Ky., 110 Ill. 348; Illinois Central v. Ryan, 164 Ill. 87; Sacred Heart Hosp. Co. v. Iron Mountain Ry. 212 Ill. 447; Fager v. Fraser, 202 Ill. App. 87.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

36037

THEKLA ROESSNER,
Plaintiff in Error,

v.

HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIEN GESELLSCHAFT, a corporation, otherwise known as HAPAG, also known as HAMBURG-AMERICAN LINES,
Defendant in Error.

269 I.A. 643

ERROR TO SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This is an action in trespass on the case for injuries sustained by plaintiff. At the close of plaintiff's case the court directed the jury to find the issues for the defendant. Judgment was entered upon the verdict. To reverse this judgment plaintiff sued out the present writ of error.

The plaintiff's amended declaration and three additional counts allege in substance that defendant, a corporation, engaged in the transportation of passengers for reward, undertook to carry plaintiff from Hamburg, Germany, to New York city; that the German National Railways was the agent of the defendant in carrying her from Hamburg to Cuxhaven on a railroad, and that her injuries were caused by the joint negligence of the German National Railways in failing to provide a safe place to alight, and the negligence of the defendant in directing and urging plaintiff to alight without rendering her proper assistance. Defendant's pleas specifically deny that the German National Railways was the agent of the defendant in carrying plaintiff from Hamburg to Cuxhaven.

The trial court instructed the jury to find for the defendant on the ground that the German National Railways was not

the agent of defendant and that plaintiff failed to establish that defendant has assumed any responsibility for the transportation of plaintiff from Hamburg to Cuxhaven.

It is true that a liability does not arise from the fact alone that a through ticket has been sold; something more is required to create a liability of such a character. (Penn. R. R. Co. v. Connell, 112 Ill. 295, 302-303.) But the defendant might, by contract, bind itself to be responsible for the entire route. (Penn. R. R. Co. v. Connell, supra; C. & A. R. R. Co. v. Lumsey, 141 Ill. 190.) The question then is, Was there shown in the instant case any evidence from which the jury might find the defendant contracted as principal to safely transport her from Hamburg to New York city?

The evidence discloses that in January, 1926, Margaret Seidenwitz, plaintiff's daughter, purchased from defendant at Leipzig, transportation for her mother from Hamburg to New York city, for which she paid $145, obtaining a receipt for the money paid. She was told to exchange the receipt for a ship ticket at Hamburg. Plaintiff and her daughter left Leipzig for Hamburg, February 10, 1926. When they arrived at Hamburg plaintiff's daughter gave the receipt to a man who met them at the station. February 12, 1926, about an hour before the train left for Cuxhaven, plaintiff's daughter was given a separate railroad ticket and a ship ticket in place of the receipt. This ship ticket plaintiff never saw. The train operated by the German National Railways, consisting of 15 to 18 cars, was a special boat train, and the car they rode in was near the end of the train of cars. Arriving at the station of the German National Railways in Cuxhaven, a steward, sent from the steamship Deutschland, took plaintiff by the arm and pointing to the exit told her to alight. She started to do so, step by step, and when on the last step, feeling no bottom, endeavored to pull

the agent of defendant and that plaintiff failed to establish that defendant had assumed any responsibility for the transportation of plaintiff from Hamburg to Gunkraven.

It is true that a liability does not arise from the fact alone that a through ticket has been sold; something more is required to create a liability of such a character. (Mann. N. Y. Ins. Co. v. Conwell, 116 Ill. 69, 68-100.) But the circumstances might, by contract, also result in a responsibility for the entire route. (Pennsylvania R. Co. v. Connell, supra; Co. R. R. Co. v. Lesser, 141 Ill. 1901.) The question then is, has there shown in the instant case any evidence from which the jury might find the defendant constituted an principal, or actual transport from Hamburg to New York city?

The evidence discloses that in January, 1924, Hungrave Maderwitz, plaintiff's daughter, purchased from defendant at Leipzig, transportation for her mother from Hamburg to New York city for which she paid $145, obtaining a receipt for the money paid. She was told to exchange the receipt for a ship ticket at Hamburg. Plaintiff and her daughter left Antwerp for Hamburg, February 17, 1924. Upon their arrival at Hamburg plaintiff's daughter gave the receipt to a man who had been at the station. February 18, 1924, about an hour before the train left for Gunkraven, plaintiff's daughter was given a separate railroad ticket and a ship ticket in place of the receipt. This only taken plaintiff never saw. The train operated by the German Railway Company, scheduled at 12 to 12 hours, was a special boat train, and the one they took is one such the and of the train of cars. Leaving at the station of the German Railway Company in Gunkraven, a steamer, and from the steamship Deutschland, took plaintiff by the arm and pushing to the rail with the in mighty. She shouted to do so, stop by -stop, and then on the last step, falling on deck, recovered to until

herself up; failing, she fell and suffered a fracture of the neck of the left femur. The ground was covered with snow and ice and was slippery and the lowest step to the ground was about two and a half feet. After plaintiff fell she was placed in a wheel chair and taken aboard the ship.

The defendant did not see fit to introduce in evidence the receipt for the money. The ticket was offered in evidence by plaintiff and recites "in consideration of the sum of dollars, received as passage money, it is agreed to transport Thekla Wüsner, as below, but only on the terms herein mentioned, in the second cabin from Hamburg to New York city, by the steamer Deutschland Captain Schwamberger from Cuxhaven on 12 Feb. 1926. The special train leaves Hamburg on 12 Feb. 1926, Central Station Platform, No. 5, at 7:45 a. m." The ticket is ten inches wide, and eleven and one half inches long, printed on both sides. The terms are nine in number, printed in the German and English language in small type, and are set forth under the heading:

"In consideration of the rate of passage paid the following stipulations are entered into by the passenger as a part of the contract.

* * *

"4. Booking on connecting routes is for the convenience of the passenger, and all moneys received hereon for transportation on such routes are accepted solely for the accommodation of the passengers, no responsibility of any kind being assumed thereby by the carrier, for, in connection with, or incidental to, transportation of the passenger, * * * over such connecting route, excepting to furnish the passenger with the connecting carrier's ticket for such transportation * * *.

"5. * * * no suit shall be maintainable for * * *

Herself up; falling, she fell and suffered a fracture of the neck of the left femur. The ground was covered with snow and ice and was slippery and the lawyer slip to the ground was about two and a half feet. After plaintiff fell she was placed in a wheel chair and taken away from ship.

The defendants did not use its influence in evidence the receipt for the money. The claims was affected in evidence by plaintiff and evidence "in consideration of the sum of dollars, receipt as general money, is in support to transport Italia Cherry as below, but only on the same Aneto mentioned, on the second voice from Hamburg to New York city, by the steamer Intercontinental Lagoria (Genoa-type from Genova on 22 Feb. 1924. The specific boat Lavoro Hamburg on 22 Feb. 1924. Instead direction steamer, Ex. 5, on Feb 6. 19." The stated in her income with, and eleven and one half inches Long, printed on both sides. The tickets are size in number, printed in the German and English language in small type, and are not forth under the heading:

"In consideration of the rate of passage paid the following stipulations are entered into by the passenger as a part of the contract.

* * *

"6. Nothing on commodity vessels is for the convenience of the passenger, and all money received beyond the transportation on such trains are supplied until the the accommodation of the passenger, no responsibility of any kind being assumed thereby by the carrier. Tax, in connection with, or incidental to, transportation of the passenger, * * * over land transporting vehicle, supplied to furnish the passenger with the connecting carrier's ticket for such transportation * * *.

"7. * * * be not could be maintainable for * * *

injury to baggage unless written notice of the claim with full particulars thereof shall have been delivered to the carrier at his office in New York or Hamburg within fourteen days after steamer's landing at port of arrival, nor for debt or detention of, or personal injury to, any passenger unless claim is made in like manner within sixty days after such landing."

It is a well settled rule of law that if there is any evidence in the record from which, if it stands alone, the jury could, without acting unreasonably in the eye of the law, find that all of the material averments of the declaration have been proved, then the cause should be submitted to a jury. (Libby, McNeil & Libby v. Cook, 222 Ill. 206; McFarlane v. N. C. Ry. Co., 288 Ill. 476; Valldren Express v. Krug, 291 id. 472.

But it is argued by defendant's counsel that plaintiff was transported under a written ticket which provided that booking on connecting routes was for the convenience of the plaintiff, and no responsibility was assumed by the defendant; that the German National Railways was not the agent of the defendant, but an independent connecting carrier, for the acts of which defendant was not liable. There is evidence that tended to prove that the contract for the transportation was made at Leipzig, while the ticket was delivered to plaintiff's daughter twelve days later at Hamburg, shortly before plaintiff's departure, which ticket she put into her pocketbook. The evidence also shows that plaintiff never saw the ticket. There is no evidence in the record that the conditions on the ticket were called to the attention of plaintiff's daughter or that she accepted it with knowledge of its contents. In Railroad v. Turner, 100 Tenn. 213, 223, it was said "the mere stamping or printing of a limitation or condition upon the back or face of a ticket, and the acceptance of such ticket by a

fully to passenger unless written notice of the claim with full particulars thereof shall have been delivered to the carrier at his office in New York or Hamburg within fourteen days after passenger's landing at port of arrival, nor for loss or damage of, or personal injury to, any passenger unless claim is made in like manner within sixty days after such landing."

It is a well settled rule of law that if there is any evidence in the record from which, if it stands alone, the jury could, without acting unreasonably in the eye of the law, find that all of the material avowments of the declaration have been proved, then the case should be submitted to a jury. (Gunter v. Atlantic & Pacific R. Co., 200 U.S. 273; Patterson v. C. B. Q. R. R. Co., 117 U.S. 491; Chicago Junction R. Co. v. Kinney, 221 U.S. 472).

But it is urged by defendant's counsel that plaintiff was transported under a written ticket which provides that handling or connecting routes was for the convenience of the plaintiff, and no responsibility was assumed by the defendant that the German National Railways was not the agent of the defendant, but an independent connecting carrier, for the acts of which defendant was not liable. There is evidence that tended to prove that the contract for the transportation was made at Leipzig, while the tickets was delivered in plaintiff's compartment twelve days later at Hamburg, shortly before plaintiff's departure, which the jury have had possession. The evidence also shows that plaintiff never saw the tickets. There is no evidence in the record that the conditions on the tickets were called to the attention of plaintiff, therefore or that she accepted it with knowledge of its contents. In Gulfstream v. Tucker, 230 Fed. 111, 116, it was said "the mere stamping or printing of a limitation or condition upon the back of the ticket or a ticket, and the acceptance of such tickets by a

passenger, without more, is not sufficient to bind him to such condition or limitation, in the absence of actual notice to him of such condition or limitation and his assent thereto when he purchases his ticket." See also Lunansky v. Hamburg American Packet Co., 99 N. Y. Supp. 810; Lechowitzer v. Hamburg American Packet Co., 27 N. Y. Supp. 140; Norman v. Southern Ry., 65 S. C. 517, 523; Thurston v. Northern Navigation Co., 205 Mich. 278; Princell v. Pickwick Greyhound Lines, 262 Ill. App. 298, 310-311; certiorari denied 262 Ill. App. XV. There was evidence to prove that defendant in Leipzig had contracted as principal to transport plaintiff from Hamburg to New York city, and it became a question of fact, for the jury to pass upon, as to whether, under all the circumstances of the case, the plaintiff agreed to any modification of the same. The court erred in directing a verdict.

Defendant's counsel also contends that the court did not err in directing the verdict because plaintiff was transported under a printed ticket which provided that no suit should be maintainable against defendant for personal injuries unless written notice of the claim shall have been delivered within 60 days after the landing of the ship at New York city, and that this condition was not complied with. We find no merit in this contention. What we said regarding stipulation No. 4 is applicable to stipulation No. 5.

Defendant also contends that plaintiff has failed to prove that the German National Railways was guilty of negligence, and that plaintiff was guilty of contributory negligence.

The negligence charged in the declaration is the failure to provide a safe place to alight. The evidence shows that the car from which plaintiff was alighting, because of the length of the train, stopped at a place where there was no platform, the distance from the lowest step to the ground being two to two and

passenger, without more, is not sufficient to bind him to such condition or limitation, in the absence of actual notice to him of such condition or limitation and his consent thereto when he purchases his ticket." See also Lawson v. Delaware Lackawanna Railway Co., 92 N. Y. Supp. 620; Sandmeier v. Southern Railway Co., 27 N. Y. Supp. 1047; Stevens v. Woodward, 6 L. R. Q. B. D. 318; Thornton v. Wickham Steamship Co., 108 Mich. 374; Kimball v. Fidelity Overgrand Fleet, 98 Ill. App. 688, affirmed without dissent 200 Ill. App. 22. There was evidence in proof that defendant in Leipzig had constructed no principal to transport plaintiff from Hamburg to New York city, and it became a question of fact, for the jury to pass upon, as to whether, upon all the circumstances of the case, the plaintiff agreed to any modification of the same. The court erred in directing a verdict.

Defendant's counsel also contended that the court did not err in directing the verdict because plaintiff was transported under a printed ticket which provided that no suit should be maintainable against the carrier, unless written notice of the claim shall have been delivered within 24 days after the landing of the ship in New York city, and that this condition was not complied with. We find no merit in this contention, that we hold regarding stipulation No. 4 is applicable to stipulation No. 8.

Defendant also contends that plaintiff has failed to prove that the German National Railways was guilty of negligence, and that plaintiff was guilty of contributory negligence.

The negligence charged in the complaint is the failure to provide a safe place to alight. The evidence shows that the car from which plaintiff was alighting, because of the length of the train, stopped at a place where there was no platform. The distance from the lowest step of the ground train is low and

a half feet, and where the ground was slippery with ice; that she was told to alight; that she started to do so step by step; when on the last step, feeling no bottom, endeavored to pull herself up; failing she fell. It is the duty of a carrier of passengers to use the highest degree of care, skill and diligence reasonably practicable, consistent with the operations of a railroad in providing passengers an opportunity and the means necessary to a safe passage from its cars. (Penn. Co. v. McCaffrey, 173 Ill. 169; Griswold v. Chicago Rys. Co., 339 id. 94.) And the passenger has a right to assume that the carrier will not expose him to any danger, which by the exercise of due care can be avoided. (Penn. Co. v. McCaffrey, supra.)

We think upon this state of the record, that the question as to whether or not the defendant was guilty of negligence, and the question as to whether or not plaintiff was guilty of contributory negligence, were questions of fact for the jury to determine.

The judgment of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Scanlan and Gridley, JJ., concur.

36003

A. W. GENTRY, for use of
CENTRAL STATE BANK OF
EVANSTON, a corporation,
Defendant in Error,

v.

C. ERNEST GUYTON and
HARRY A. CUMFER,
Plaintiffs in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

269 I.A. 643

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Central State Bank of Evanston obtained a judgment by confession against A. W. Gentry in the sum of $3,254.67. After execution was returned "no property found and no part satisfied," C. Ernest Guyton, Harry A. Cumfer, Owen D. McFarland and Guyton & Cumfer Mfg Co. (a corporation) were summoned as garnishees. Plaintiff thereafter dismissed as to the corporation. Guyton, Cumfer and McFarland each filed an answer, which averred that he had no funds belonging to Gentry. The plaintiff contested the answers. The case was tried by the court and there was a judgment entered against Guyton for the sum of $10,920, of which $3,267.67 should be for the use of Central State Bank of Evanston and the residue for the use of Gentry; and one against Cumfer for the sum of $6,257.50, of which $3,267.67 should be for the use of Central State Bank of Evanston and the residue for the use of Gentry. During the hearing of the cause it appeared that Gentry had executed, for a valuable consideration, a release in full to McFarland, and because of this fact the trial court, in the judgment order, discharged McFarland. Guyton and Cumfer "severally" prayed an appeal. Neither perfected one but they jointly sued out this writ of error. On May 16, 1932, they filed

their brief in this court. On June 6, 1932, a general appearance for "A. W. Gentry and Central State Bank of Evanston, defendants in error," was entered and on June 14, 1932, "defendant in error" filed a written motion: "* * * to dismiss the writ of error * * * and in support of said motion show to the court the following reasons, towit: 1. There is a misjoinder in this court of plaintiffs in error. 2. It appears from the return to the writ of error herein that the judgments sought to be reviewed herein were several judgments against the plaintiffs in error severally, and were not joint judgments against them jointly." The argument in support of this motion is that there were separate judgments against the two garnishees and therefore "there is a misjoinder of plaintiffs in error in this court;" in other words, that the two garnishees were obliged to sue out separate writs of error. We find no merit in this motion. In Cooke v. Cooke, 194 Ill. 225, 227-8, the court said: "Any one who is a party to the record or is shown by the record to be prejudiced by a judgment or decree may sue out a writ of error and is permitted to use the names of all his co-defendants without their consent. (Practice act, sec. 70; 3 Starr & Cur. Stat. 1896, p. 3099.) But he cannot prosecute his writ without joining his co-defendants who are identified in interest with him, and obtain the judgment of this court so far as the decree affects him. Plaintiff in error was but one if the defendants in the circuit court and all the other defendants were united in interest with him. The decree affects them all and in the same way, and it did not have the effect of a several judgment or decree against different parties. They had no separable interest in the suit, and the rule is elementary that a case cannot be heard at one time as to one party and at another time as to another. The writ of error must agree with the record, and in order to

their belief in this court. In Ruan v. 1922, a general appearance for "A. E. Quigley and Central Stamp Book of Washington, defendants in error," was entered and on June 14, 1922, "defendants in error" filed a written motion: "* * * to dismiss the writ of error * * * and in support of said motion show to the court the following reasons, towit: 1. There is a multiplicity in this court of plaintiffs in error. 2. It appears from the return to the writ of error herein that the judgments sought to be reviewed herein were several judgments against the plaintiffs in error severally, and were not joint judgments against them jointly." The argument in support of this motion is that their were separate judgments against the two guarantors and therefore "there is a multiplicity of plaintiffs in error in this court." In other words, that the two guarantors were obliged to use one separate writ of error. We find no merit in this motion. In Hardin v. Jordan, 140 U.S. 371-4, the court said: "Any one who is a party to the record or is shown by the record to be prejudiced by a judgment or decree may use one a writ of error and be permitted to use the name of all his co-defendants without their consent. (Treasurer v. Hay, 2 Black 635; Cox v. Thomas, 1 Wall. p. 329.) But he cannot prosecute his writ without joining his co-defendants who are interested with him, and obtain the judgment of this court as for the benefit of his own. PLAINTIFF IN ERROR MAY USE IT THE STATUTORY NAME IN THE STATES WHERE ALL THE OTHER DEFENDANTS WERE MADE IN STATUTORY FORM. The device attempt thus all and in the same or and if he did not have the effect of a several judgment or decree against different parties. They had no separate interest in the suit, and the rule is elementary that a case cannot be brought on one time in the name party and at another time on it another. The suit of error must agree with the record, and the error is

bring the decree up for review by writ of error, all who were defendants in the original suit who are alive must join in the writ of error, so that the whole case may be disposed of and that the record may agree with the record below. (McIntyre v. Sholty, 139 Ill. 171; 2 Ency. of Pl. & Pr. 185.)" (See also Muzaburger v. Muzaburger, 221 Ill. 277, 279; Clark v. Kalaski, 268 Ill. 427, 434.) In the instant proceedings the three garnishments were heard together, and all the findings and judgments were entered in one order. Guyton and Cumfer joined in suing out the writ of error and both joined in the assignment of errors. The claim against the three garnishees grew out of the same subject matter and we are unable to see wherein the defendant in error has any just cause to complain of the procedure followed. It must be noted that defendant in error has not raised, in this court, the point of nonjoinder; in other words, that McFarland was not made a defendant in error. In any event, the proof shows conclusively that in September, 1930, Gentry, for a valuable consideration, executed a release in full of all claims and demands that he had against McFarland, and it would avail defendant in error nothing had he been given an opportunity to file cross-error as to the trial court's judgment discharging McFarland. The motion of defendant in error to dismiss this writ of error is denied.

The three garnishees owned all the stock of the Guyton-Cumfer Manufacturing Company, and it was the theory of defendant in error that they entered into an oral agreement with Gentry to pay him five per cent commission if he sold the company for $600,000, that he thereafter brought about a sale of the company to Willard J. Mason and that there was due to him from the three garnishees the sum of $30,000, less $9,528, which he admitted had been paid

being the owners up for review by writs of error, all who were defendants in the original suit who are alive must join in the suit of error, so that the whole case may be disposed of and that the rights may agree with the present owners. (Hallinger vs. Davis, 146 U.S. 314; Bray, et al. v. Ry. Co.) (See also Hartshorne vs. Shoemaker, 244 U.S. 277, 279; Klein vs. Lockport, 244 U.S. 463, 464.) In the instant proceeding the three Quackenbushes were bound together, and all the findings and judgments were entered in one action. Dorian and Hunter joined in suing out the writ of error but both joined in the assignment of errors. The claim asserted the three petitioners were out of the zone subject before and in any trouble in the wherein the defendant in error has only just cause to complain of the procedure followed. It must be noted that defendant in error has not raised, in this court, the point of nonjurisdiction in which cases, that defendant was not made a defendant in error. In our view, the proof shows specifically that in original Jay-Bird, for a valuable consideration, conveyed a release in full of all claims and demands that he had against Hartland, and it would work injustice in every nothing has in been given an opportunity to file cross-error as in the trial court's judgment disinterested material. The matter of interest in error is therefore the right of error to decide.

The three petitioners owned all the stock of the Dorian-Hunter Manufacturing Company, and it was the manner of entering in error that they entered into an oral agreement with Hartley on the five per cent commission if he sold the company for $500,000, that he guaranteed enough above a sale of the company to William A. Young and that Young was due to file from the three petitioners the sum of $50,000, less $9,000, which he admitted had been paid

to him by them, leaving a balance due him of $20,472. The three garnishees claimed that they made no agreement of any kind with Gentry as to the sale of the Manufacturing Company, but that after they had sold their stock in that company to Mason the latter informed them that Gentry was demanding a commission of $15,000, on the ground that he had brought about the sale, and that while they then and at all times denied that they had any agreement with Gentry, they "finally agreed we would pay him $12,000 according to our stock holdings in the Guyton-Cumfer and to be paid as we received our money from Mr. Mason." The contract entered into between Mason and the three garnishees provided that the latter agreed to sell to Mason the entire capital stock of the Guyton-Cumfer Manufacturing Company for $250,000 in cash and 17,500 shares of preferred stock and 35,000 shares of common stock of a corporation to be organized, or the old company reorganized, and that certain cash payments should be made monthly commencing August 5, 1929, and extending to August 1, 1930. The contract does not state the number of shares of stock sold nor the amount of stock owned or sold by each of the three garnishees, nor does it state how the monthly payments were to be divided among the three garnishees. It provides that of the preferred stock to be thereafter issued, Guyton was to receive $156,000 par value, Cumfer, $129,100 par value, and McFarland, $64,900 par value, "and in addition thereto each of the said parties shall receive two shares of common stock in the said new or reorganized corporation for each share of preferred stock delivered to him as provided above." The evidence shows that Guyton owned 52 per cent of the stock of the old company and that Cumfer and McFarland each owned 24 per cent.

Plaintiffs in error contend: (a) "The judgments of the court were against the manifest weight of the evidence;" (b)

to him by them, leaving a balance due him of $40,472. The three
gentlemen claimed that they made no agreement of any kind with
Gentry as to the sale of the Manufacturing Company, but that after
they had sold their stock in that company to Mason the latter ma-
fested that that Gentry was insisting a commission of $15,000, on
the ground that he had brought about the sale, and that while they
then and at all times denied that they had any agreement with
Gentry, they finally agreed we would pay him $22,000 according to
our stock holdings in the Oxygen-Co. and to be paid as we re-
ceived our money from Mr. Mason." The contract entered into
between Mason and the three gentlemen provided that the latter
agreed to sell to Mason the entire outstanding stock of the Oxygen-
Carbon Manufacturing Company for $180,000 in cash and 17,000 shares
of preferred stock and 35,000 shares of common stock of a cor-
poration to be organized, or the old company reorganized, and that
certain cash payments should be made monthly commencing August 5,
1899, and extending to August 1, 1900. The contract does not state
the number of shares of stock sold nor the amount of stock owned
or sold by each of the three gentlemen, nor does it state how
the monthly payments were to be divided among the three gentlemen.
It provides that of the preferred stock to be thereafter issued,
Oxygen was to receive $156,000 par value, Gunter, $120,100 par
value, and McClelland, $40,000 par value. "And in addition thereto
each of the said parties shall receive the shares of common stock
in the said new or reorganized corporation for each share of
preferred stock delivered to him as provided above." The evidence
shows that Oxygen owned 39 per cent of the stock of the old
company and that Gunter and McClelland each owned 24 per cent.

Plaintiffs in error contend: (a) "The judgments of
the court were against the manifest weight of the evidence" (b)

"If any liability existed in favor of the plaintiff, Gentry, against the defendants, C. Ernest Guyton and Harry A. Cumfer, the amount of the judgments rendered was excessive;" and (c) "If any liability existed in favor of the plaintiff, Gentry, against the defendants, the trial court erred in dividing and pro-rating the liability among them." As to contention (a), plaintiffs in error strenuously argue that the great weight of the evidence sustains their position that they never had any agreement with Gentry in reference to the sale of the Guyton-Cumfer Manufacturing Company. We find that this contention is, undoubtedly, a meritorious one, but our conclusion in that regard does not determine or control this appeal, because it is admitted by the plaintiffs in error and McFarland that after Mason apprised them of the claim made by Gentry, in order to get rid of the claim, they finally agreed to pay Gentry $12,000, in accordance with certain conditions, and each of them further admits that he made payments to Gentry as he received cash payments from Mason. As we read the record, each of the garnishees agreed to pay to Gentry a certain portion of $12,000, the amount of the same to be in proportion to his stock holdings in the company and to be paid to Gentry as Mason made his cash payments to the garnishee. For instance, Guyton owned 52 per cent of the stock of the company and he agreed to pay Gentry 52 per cent of $12,000, payments on the same to be made as he received his cash payments from Mason. Guyton and Cumfer each admitted that he was obligated under the agreement to pay to Gentry a certain portion of the $12,000 under the conditions stated. McFarland also made a like admission, but it appears that after he had paid $2,196 to Gentry the latter gave him a receipt in full.

After a careful consideration of all the evidence we are satisfied that the amounts of the judgments against Guyton and

"If any liability existed in favor of the plaintiff, Gentry, against the defendants, C. Ernest Guyton and Henry A. Hunter, the amount of the judgments rendered was excessive;" and (c) "If any liability existed in favor of the plaintiff, Gentry, against the defendants, the trial court erred in dividing and pro-rating the liability among them." As to contention (a), plaintiffs in error strenuously argue that the great weight of the evidence sustains their position that they never had any agreement with Gentry in reference to the sale of the Guyton-Hunter Manufacturing Company. We find that this contention is, undoubtedly, a meritorious one, but our conclusion in that regard does not determine or control this appeal, because it is admitted by the plaintiffs in error and McFarland that after Mason appraised them of the claim made by Gentry, in order to get rid of the claim, they finally agreed to pay Gentry $12,000, in accordance with certain conditions, and each of them further admits that he made payments to Gentry as he received each payments from Mason. As we read the record, each of the guarantees agreed to pay to Gentry a certain portion of $12,000, the amount of the same to be in proportion to his stock holdings in the company and to be paid to Gentry as Mason made his cash payments to the guarantors. For instance, Guyton owned 52 per cent of the stock of the company and he agreed to pay Gentry 52 per cent of $12,000, payments on the same to be made as he received his cash payments from Mason. Guyton and Hunter each admitted that he was obligated under the agreement to pay to Gentry a certain portion of the $12,000 under the conditions stated. McFarland also made a like admission, but it appears that after he had paid $2,126 to Gentry the latter gave him a receipt in full.

After a careful consideration of all the evidence we are satisfied that the amounts of the judgments against Guyton and

Cumfer are excessive. In fact, we are unable to find any facts that would reasonably warrant such amounts. We are satisfied that the great weight of the evidence sustains the contention of the plaintiffs in error that the maximum amount to be paid to Gentry by the three garnishees was $12,000. As to Guyton: He admits that he owned 52 per cent of the stock in the Manufacturing Company and he was therefore obligated to pay a maximum amount of $6,240. He states in his testimony that he made one payment to Gentry of $3,120 and another of $1,560, a total of $4,680. He further states that he was to receive, in cash, from Mason, $156,000, but that he received from the latter only $120,000 in cash, or 10/13 of the cash payments due him from Mason, of which amount received Gentry was entitled to $4,800. As he had paid Gentry at the time of the hearing only $4,680, he then owed him $120. As to Cumfer: It appears from the testimony of McFarland that the latter owned 24 per cent of the stock in the company and Cumfer 24 per cent. Cumfer was therefore obligated to pay Gentry 24 per cent of $12,000, or a maximum amount of $2,880. It further appears that Mason was to pay Cumfer in cash, under the contract, $49,556.48, but that he had paid him in cash only $32,044.48, or approximately 16/25, of which amount so paid Gentry was entitled to approximately $1,840. As Cumfer paid Gentry $2,652.50, there is merit in his contention that he overpaid Gentry.

The Guyton-Cumfer Manufacturing Company went into the hands of a receiver and Guyton and Cumfer each received an unsecured note from Mason for the balance due him under the contract. Nothing was ever paid upon these notes, and as it is perfectly clear from the proof that each of the garnishees was to make payments to Gentry as he received cash payments from Mason, these notes could not be taken into consideration in determining

Dunfer are excessive. In fact, we are unable to find any facts that would reasonably warrant such amounts. We are satisfied that the great weight of the evidence sustains the contention of the plaintiffs in error that the maximum amount to be paid to Gentry by the three guaranteeing was $12,000. As to Dayton: He admits that he owned 32 per cent of the stock in the Manufacturing Company and he was therefore obligated to pay a maximum amount of $6,840. He states in his testimony that he made one payment to Gentry of $2,120 and another of $1,000, a total of $4,040. He further states that he was to receive, in cash, from Mason, $196,000 but that he received from the latter only $130,000 in cash, or 16/17 of the cash payments due him from Mason, of which amount Gentry was entitled to $4,888. As he had paid Gentry at the time of the hearing only $4,040, he then owed him $720. As to Dunfer: It appears from the testimony of Gentry that the Jiffy owed 24 per cent of the stock in the company and Dunfer 24 per cent. Dunfer was therefore obligated to pay Gentry 24 per cent of $12,000, or a maximum amount of $2,880. It further appears that Mason was to pay Dunfer in cash, under the contract, $42,886.48, but that he had paid him in cash only $32,044.43, or approximately 16/18, of which amount so paid Gentry was entitled to approximately $1,846. An Dunfer paid Gentry $2,222.50, there is merit in the contention that he overpaid Gentry.

The Dayton-Dunfer Manufacturing Company went into the hands of a receiver and Dayton and Dunfer each received an unsecured note from Mason for the balance due him under the contract. Nothing was ever paid upon these notes, and as it is perfectly clear from the proof that each of the plaintiffs was to make payments to Gentry as he received cash payments from Mason, these notes could not be taken into consideration in determining

what, if any amount, was due Gentry at the time of the trial.

Plaintiffs in error contend that "if any liability existed in favor of the plaintiff, Gentry, against the defendants, C. Ernest Guyton and Harry A. Gumfer and Owen D. McFarland, the release of Owen D. McFarland, one of the joint obligors, released the other two." Because of the theory of fact of the three garnishees, we find no merit in this contention. Each of the garnishees, according to his own testimony, agreed to pay Gentry a certain proportion of the $12,000.

If within ten days the defendant in error files in this court a remittitur of $10,800 from the amount of the judgment entered against Guyton, the judgment against Guyton will be affirmed for $120, otherwise it will be reversed and the cause, as to Guyton, remanded to the Municipal court of Chicago for a new trial. The judgment of the Municipal court of Chicago against Gumfer is reversed.

JUDGMENT AGAINST PLAINTIFF IN ERROR GUYTON AFFIRMED FOR $120 UPON REMITTITUR OF $10,800; OTHERWISE REVERSED AND REMANDED FOR A NEW TRIAL.

JUDGMENT AGAINST PLAINTIFF IN ERROR GUMFER REVERSED.

Kerner, P. J., and Gridley, J., concur.

whole, if any remnant, was the property of the king of the court.

"Liability" is more modern than "if any liability" which is less of the past-liability. Society, against the individual, is treated during any delay in trial and time in judgment, the values of "man" in individual, are of the later religions, although the elder are. Remnant of the liberty of flux of the there conditions, or land as merit in this monotheism. Each of the primitives according to his own testimony, appeal to the church a private judgment of the city.

If within one hour the defendant is never filed in this court a petition of citizens from the members of the judgment against Dayton, the judgment against Dayton will be affirmed for life; otherwise it will be reversed and the cause as in express remedies to the material court of Dayton for a new trial. The judgment of the Municipal Court of Dayton against Dayton is reversed.

"Remedy against liability in some matter
liability."

"Remedy against liability in some cases
liability."

Author: P. Jr. and Brinkley, J.c. Dissent.

36138

RUTH M. MONDIENTZ,
Appellee,

vs.

ROBERT REID and A. D. SCHLAUDER,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

269 I.A. 643

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

On the evening of November 12, 1928, while plaintiff, going north on Kilbourn avenue in Chicago, was attempting to cross Washington boulevard, she was struck by an automobile belonging to defendant A. D. Schlauder, which was being driven west on Washington by defendant Robert Reid, the sole occupant. She sustained serious injuries and brought suit for compensation; upon trial she had a verdict and judgment against the defendants for $7,500. In this court the only brief filed is on behalf of Schlauder, who contends that Reid was not acting as his employee at the time of the accident. The brief presents only three points.

It is first urged that the court erroneously instructed the jury that in fixing damages it might consider "future suffering and physical impairment," and it is said the record contains no evidence as to any permanent injuries. On the contrary, there was abundant evidence on this point. Plaintiff suffered a compound comminuted fracture of the right leg; this became infected; two operations were necessary besides a complicated course of treatment; the injury left her with a shortage of half an inch in the right leg, with some stiffness of the ankle and a marked scar. Plaintiff testified that there is a dull ache in the bone from the ankle to the hip whenever there is a change of weather. The facts justified the instruction.

The next point made is that the trial court improperly refused to direct a verdict in favor of the defendant Schlauder at

APPEAL FROM APPELLATE COURT
OF COOK COUNTY.

RUTH M. MONCIRTER,
Appellee,

vs.

MONROE REID and A. D. FERNANDEZ,
Appellants.

M. Presiding Justice Mcsurely
DELIVERED THE OPINION OF THE COURT.

On the evening of November 13, 1956, while visibility, going north on Kildare avenue in Chicago, was attempting to cross Washington boulevard, she was struck by an automobile belonging to defendant A. D. Fernandez, which was being driven west on Washington by defendant Monroe Reid, the sole occupant. She sustained serious injuries and brought suit for compensation; upon trial she had a verdict and judgment against the defendants for $7,500. In this court the only brief filed is on behalf of Fernandez, who contends that Reid was not acting as his employee at the time of the accident. The brief presents only three points.

It is first urged that the court erroneously instructed the jury that in fixing damages it might consider "future suffering and physical impairment," and it is said the record contains no evidence as to any permanent injuries. On the contrary, there was abundant evidence on this point. Plaintiff suffered a compound comminuted fracture of the right leg; this became infected; two operations were necessary besides a complicated course of treatment; the injury left her with a shortage of half an inch in the right leg, with some stiffness of the ankle and a marked scar. Plaintiff testified that there is a dull ache in the bone from the ankle to the hip whenever there is a change of weather. The facts justified the instruction.

The next point made is that the trial court improperly refused to direct a verdict in favor of the defendant Fernandez at

the close of the plaintiff's case. The defendant did not stand on his motion for a directed verdict, but thereafter offered evidence on his own behalf. He thereby waived his motion and cannot assign the decision of the court thereon as error. Meier v. Hartman, 266 Ill. App. 466; Princell v. Pickwick Greyhound Lines, Inc., 262 Ill. App. 298; Wolf Co. v. Refrigerating Co., 252 Ill. 491.

The last point is that the court should have allowed defendant Schlauder's motion for a directed verdict at the close of all the evidence. A motion to direct a verdict presents the question of law whether, when all the evidence is considered, together with all reasonable inferences drawn from it, in its most favorable aspect to the party against whom the motion is directed, there is a total failure to prove the necessary elements of the case. Upon such a motion the evidence should not be weighed to determine the preponderance, and even if the court is of the opinion that there is evidence which, standing alone, is sufficient to sustain a verdict, but that such verdict, if returned, must be set aside because against the manifest weight of all the evidence, the motion for a directed verdict must be denied. Foreman-State T. & S. Bank v. Demeter, 347 Ill. 72; Libby, McNeill & Libby v. Cock, 222 Ill. 206.

Defendant Schlauder asserts as a matter of law that at the time Reid was driving the car causing the accident he was not acting within the scope of his employment, and therefore he, Schlauder, can not be held liable under the rule of respondeat superior.

Schlauder was a dealer in automobiles; he maintained a garage and place of business at Downers Grove, Illinois; he also was interested in a garage at 218 West Madison street, Oak Park, where he exhibited and offered cars for sale. Reid had been employed by him for about six months prior to the accident as a mechanic and salesman; for the first five months of that period he worked at the establishment at Downers Grove, but during the last month and immediately prior to

the close of the plaintiff's case. The defendant did not stand on his motion for a directed verdict, but thereafter offered evidence on his own behalf. He thereby waived his motion and cannot assign the decision of the court thereon as error. Meier v. Jackson, 226 Ill. App. 446; Prescott v. Illinois Bituminous Coal Co., 221 Ill. App. 394; Hall v. Bellefontaine Co., 225 Ill. 492.

The last point is that the court should have allowed defendant's motion for a directed verdict at the close of all the evidence. A motion to direct a verdict presents the question of law whether, when all the evidence is considered, together with all reasonable inferences drawn from it, in its most favorable aspect to the party against whom the motion is directed, there is a total failure to prove the essential elements of the case. Upon such a motion the evidence should not be weighed to determine the preponderance, and even if the court is of the opinion that there is evidence which, standing alone, is sufficient to sustain a verdict, but that such verdict, if returned must be set aside because against the manifest weight of all the evidence, the motion for a directed verdict must be denied. Lawson-Hall v. G. & S. Coal Co., 247 Ill. 73; Lipke, Executor v. Pike, 225 Ill. 326.

Defendant Dahlmeier asserts as a matter of law that at the time field was driving the car causing the accident he was not acting within the scope of his employment, and therefore he, Dahlmeier, can not be held liable under the rule of respondeat superior.

Dahlmeier was a dealer in automobiles; he maintained a garage and place of business at Downers Grove, Illinois; he also was interested in a garage at 210 West Madison street, Oak Park, where he exhibited and offered cars for sale. Hale had been employed by him for about six months prior to the accident as a mechanic and salesman for the first time thereof that period he worked at the establishment at Downers Grove, but during the last month and immediately prior to

the time of the accident he worked in the Oak Park garage. This Oak Park garage was under the management of a Mr. H. A. Patten; Schlauder says that Patten was not employed by him, but that he consigned cars to him for sale. Reid says he worked in the Oak Park garage under the direction of Mr. Patten. Schlauder was at this garage almost every day. Two days prior to the accident Schlauder called Reid, who was at the Oak Park garage, telling him to take a car from Downers Grove and deliver it to a Mr. Beifeldt in Chicago, and Reid did so; this was pursuant to an agreement whereby Schlauder loaned Beifeldt the car over the week-end; Beifeldt, with a Mr. Hess, was in the automobile financing business in Chicago, and had business dealings with Schlauder, who sold commercial paper to them.

On the Monday after Schlauder loaned Beifeldt the car Schlauder telephoned him asking that it be returned; Beifeldt said it was inconvenient to return it to Downers Grove but that he would return it by Mr. Hess to the Oak Park garage; this was agreeable to Schlauder. On that evening Reid was on duty in the Oak Park garage; Hess arrived with the car at this place at about 6:30 o'clock in the evening; Hess then requested that he be driven to his home, which was some distance north of Madison street and rather inaccessible by street car. Reid says that Patten directed him to drive Mr. Hess to his home. Reid took Hess to his home and upon the return trip to the Oak Park garage, ran into plaintiff. Reid reported the accident to Schlauder, who in the meantime had arrived at the Oak Park garage. Reid received his pay from Schlauder during all of the time in question, including the day of the accident, although he was discharged by Schlauder the following day. There is some evidence suggesting that the telephone in the Oak Park garage was in Schlauder's name.

We thus have Reid, an employee of Schlauder, paid by him, working in the Oak Park garage under the direction of Mr. Patten.

the time of the accident he worked in the Oak Park garage. This Oak Park garage was under the management of A. W. Patten; Schlander says that Patten was not employed by him, but that he consigned cars to him for sale. Reid says he worked in the Oak Park garage under the direction of Mr. Patten. Schlander was at this garage almost every day. Two days prior to the accident Schlander called Reid, who was at the Oak Park garage, telling him to take a car from Downers Grove and deliver it to a Mr. Belfield in Chicago, and Reid did so; this was pursuant to an agreement whereby Schlander loaned Belfield the car over the week-end; Belfield, with a Mr. Hess, was in the automobile financing business in Chicago, and had business dealings with Schlander, who sold commercial paper to them.

On the Sunday after Schlander loaned Belfield the car Schlander telephoned him making that it be returned; Belfield said it was inconvenient to return it to Downers Grove but that he would return it by Mr. Hess to the Oak Park garage; this was agreeable to Schlander. On that evening Reid was on duty in the Oak Park garage; Hess arrived with the car at this place at about 8:30 o'clock in the evening; Hess then requested that he be driven to his home, which was about eleven rods of Madison street and rather inaccessible by street car. Reid says that Patten directed him to drive Mr. Hess to his home. Reid took Hess to his home and upon the return trip to the Oak Park garage, ran into plaintiff. Reid reported the accident to Schlander, who in the meantime had arrived at the Oak Park garage. Reid received his pay from Schlander during all of the time in question, including the day of the accident, although he was discharged by Schlander the following day. There is some evidence tending to show that the telephone in the Oak Park garage was in Schlander's name.

We also have Reid, an employee of Schlander, paid by him, working in the Oak Park garage under the direction of Mr. Patten.

It was for the jury to determine whether, in obeying the instructions of Mr. Patten to drive Hess to his home, Reid was acting in the scope of his employment as the servant of Schlauder. It can not be said as a matter of law that he was not so acting.

The general rule is that where the relation of master and servant exists and a third party is injured through the negligence of the servant, the negligence may be imputed to the master and he may be held liable for the resulting damages if the servant was at the time acting in the master's business and within the scope of his employment. If he is then acting outside of the scope of his employment, the master is not liable. Cases cited by defendant can be readily distinguished from the instant case. In Nelson v. Stutz Chicago Factory Branch, 341 Ill. 387, the servant took the car from the possession of his employer in violation of the employer's express prohibition. In Miller v. National Automobile Sales Co., 177 Ill. App. 367, the employee was using an automobile after business hours in taking his family for a drive. In other cases cited the servant at the time of the accident was using the vehicle in connection with his own private purposes. In Kavale v. Morton Salt Co., 242 Ill. App. 205, (affirmed in 329 Ill. 445) the court said that the difficult question to determine is whether the particular act for which liability is sought to be imposed was committed by the employee within the scope of his employment, and that "this obviously can be determined by no fixed rule, but must be ascertained by the facts in each particular case." See also Moore v. Rosenmond, 238 N.Y. 356.

We are of the opinion that the evidence, with all of the reasonable inferences to be drawn therefrom, was for the jury to consider, and that the court properly denied the motion for a directed verdict, and the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

It was for the jury to determine whether, in charging the instructions at 12, Jones is guilty here in his home, had you acting in the scope of his employment as the servant of defendant. It was not so said as a matter of law that he was not so acting.

The general rule is that where the relation of master and servant exists and a third party is injured through the negligence of the servant, the negligence may be imputed to the master and he may be held liable for the resulting damage if the servant was at the time acting in the master's business and within the scope of his employment. If he is then acting outside of the scope of his employment, the master is not liable. Cases cited by defendant are readily distinguished from the instant case. In Tatum v. Lucas Chevrolet Factory Branch, 221 Ill. 367, the servant took the car from the possession of his employer in violation of the employer's express prohibition. In Miller v. National Automobile Dealer Co., 177 Ill. App. 367, the employee was using an automobile after business hours in taking his family for a drive. In other cases cited the servant at the time of the accident was using the vehicle in connection with his own private purposes. In Kanski v. Kaufman Dry Co., 241 Ill. App. 317, (affirmed in 280 Ill. 449) the court said that the difficult question to determine is whether the particular act for which liability is sought to be imposed was committed by the employee within the scope of his employment, and that this obviously can be determined by no fixed rule, but must be ascertained by the facts in each particular case. See also Sears v. Zimmerman, 161 N.Y. 148.

We are of the opinion that the evidence, also act of the responsible individuals to be given therefrom, was for the jury to consider, and that the court properly denied the motion for a directed verdict, and the judgment is affirmed.

AFFIRMED.

Barnard and O'Connor, JJ., concur.